Supreme Court, U.S.
FILED

(2)

No. 03 692 NOV 4 - 2003

In The

Supreme Court of the United States

Edna J. Valentine-Staats,
The United States Bankruptcy Trustee, and
Their Successors In Interest
Petitioners

v.

The Government of The District of Columbia,
The Estate of Daniel B. Delaney,
Lawrence Elliott In His Personal Capacity
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

APPENDIX, VOLUME 1

Walter T. Charlton
Counsel of Record
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SUPERIOR COURT OP THE DISTRICT OF COLUMBIA
OFFICE OF THE REGISTER OP WILLS
PROBATE DIVISION

Daniel **Boone Delaney, deceased**

FILED
DOCKETED
JAN 24 1997
Register Of Wills
Clerk Of The Probate Division

This matter came before the Court on January 23, 1997, on a scheduled status hearing for Plaintiff's Motion for Summary Judgment filed herein on September 4, 1996, by Lawrence M. Elliott, Personal Representative of the above-captioned estate, and all subsequent pleadings filed after September 4, 1996 Lawrence M. Elliott,
Plaintiff and Edna J.Valentine,
Defendant.
The Court heard oral representations from the following individuals who were present: Edna J. Valentine, Defendant, Lawrence M. Elliott, Personal Representative and Plaintiff, Jason Green, counsel for the Personal Representative, Raymond Benzinger, counsel for the Defendant.

The Court after hearing representation Ordered Edna J. Valentine to deposit proceeds in the amount of $704,794.00 that relates to the Merrill Lynch Account into an Escrow Account with the Register of Wills Office on or before February 7, 1997, with certification and receipt evidencing said deposit. Ms. Valentine is Ordered not to transfer any monetary funds that she holds on her person or in safe

keeping, any funds in any Bank account that she also currently holds, individually or jointly with *any* other party, until further Order of this Court. Ms. Valentine is also Ordered not to sell, transfer, or give away or encumber any real and personal property for which she holds the title individually or is co-owner, enter into any sales agreement on said property, or negotiate any mortgages on said property, or negotiate any loans or liens against said property until further Order of this Court. The Court further Ordered Ms. Valentine to file a detailed accounting from the date of death to January 23, 1997, as it relates to the decedent's estate by no later than February 28, 1997. Lastly, the Court Ordered Ms. Valentine to observe that if she fails to obey the Court's directive she will be in violation of this Court's Order and held in contempt of court, with a possible a fine and/or incarceration.

24th day of

WHEREFORE, it is this 24th day of January, 1997 by the Court this ORDERED, that Edna J. Valentine is Ordered to deposit into an Escrow Account with the Register of Wills Office the sum of $704,794.00 that relates to the Merrill Lynch Account on or before February 7, 1997; and it is further

ORDERED, that Edna J. Valentine shall not transfer any monetary funds that she holds on her person or in safe keeping, any funds in any Bank account that she currently holds, individually or jointly with any other party, until further Order of this Court; and it is further

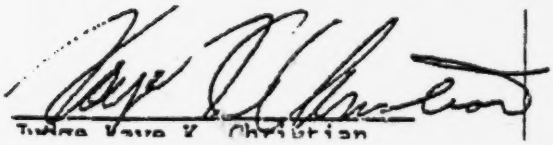
ORDERED, that Edna J. Valentine shall

not sell, transfer, or give away or encumber any real and personal property for which she holds the title individually or is co-owner, entered into any sales agreement on said property, or negotiate any mortgages on said property, or negotiate any loans or liens against said property until further Order of this Court; and it is further

ORDERED that Edna J. Valentine is directed to file a detailed accounting from the date of death to January 23, 1997, of any and all proceeds that relates to the above-captioned estate no later than February 28, 1997; and it is further

ORDERED, that if Edna J. Valentine fails to obey the Court's directive she will be in violation of this Order and held in contempt of court, subject to a fine and/or incarceration.

SO ORDERED.



Judge Kaye K. Christian

signed in chambers

[ ] signed on the bench

cc:
Register of Wills

Jason P. Green, Esquire 4301 Verplanck Place, N. W. Washington, DC 20016

Raymond B. Benzinger, Esquire 209 N

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA OFFICE OF THE REGISTER OF WILLS PROBATE DIVISION WASHINGTON, DC 20001

RE: Estate of
Daniel B. Delaney, deceased

Admn.No. 1809-93

FILED
DOCKETED
JAN 27 1997

Lawrence M. Elliott
Plaintiff
-v-

Edna J. Valentine
Defendant

Register Of Wills Clerk Of
The Probate Division

ORDER

This matter came before the Court on January 23, 1997, on the status hearing of the above-captioned estate.

The Court heard oral representation from all parties and directed the Plaintiff and defendant to submit at least two names of Accountants to audit the assets of the Estate of Daniel B. Delaney, deceased, from the date of death to January 23, 1997.

WHEREFORE, it is by the Court this day of 1997

ORDERED, that Charles R. Goldstein, CPA, CIRA, CFE of the firm of C. W. Amos and Company, PLLC is to audit the assets of the Estate of Daniel B. Delaney, deceased from the date of death to January 23, 1997; and it is further

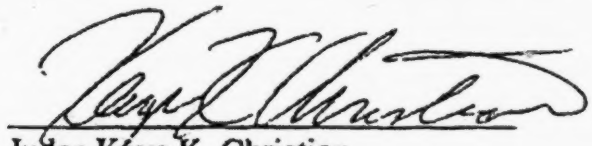
ORDERED, that the accounting is to be submitted no later than February 28, 1997; and it is further

ORDERED, that the expense of said audit is to be borne by Edna J. Valentine; and it is further

ORDERED, that this matter is continued for further status on March 11, 1997, at 10:30 a.m., in Courtroom 215.

SO ORDERED.

cc:



Judge Kaye K. Christian

Calendar Clerk

Raymond Benzinger, Esquire 2009 N 14th Street Arlington, VA 22201

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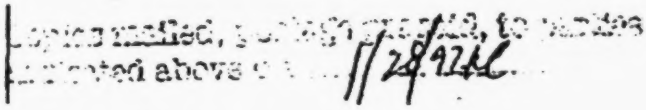
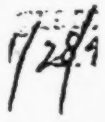
Charles Goldstein
C.W.. Amos & Company, LLC 901 15th Street, N.W. Suite



370 Washington, *DC* 20005



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AUG 6 2003

Nos. 97-PR-1217, 98-PR-934, 98-PR-1104, 98-PR-1771, 99-PR-531, 99-PR-1392 &
99-PR-1619 IN RE: ESTATE OF DANIEL B. DELANEY
EDNA J. VALENTINE,
Appellant,

ADM 1809-93
v.
LAWRENCE M. ELLIOTT,
Appellee.
Nos. 00-PR-71, 00-PR-768 & 00-PR-808
IN RE: ESTATE OF DANIEL B. DELANEY
LAWRENCE M. ELLIOTT and R. ELIOT ROSEN,
Appellants,
v.
CHRISTOPHER G. HOGE,
Appellee.
Nos. 00-PR-873, 00-PR-904 & 00-PR-905 IN RE: ESTATE OF DANIEL B. DELANEY
CHRISTOPHER G. HOGE,
Appellant,

v.
EDNA J. VALENTINE,
Appellee.

No. 01-PR-1469
IN RE: ESTATE OF DANIEL B. DELANEY
LAWRENCE M. ELLIOTT,
Appellant,
v.

CHRISTOPHER G. HOGE,
Appellee.

BEFORE: Wagner, Chief Judge; Terry, Steadman, Schwelb, Farrell, Ruiz, Reid, Glickman, and Washington, Associate Judges.

ORDER

On consideration of appellants' petition for rehearing en banc; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

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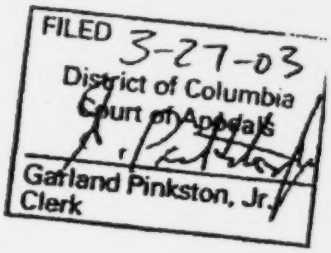
Notice: This opinion is subject to formal revision before publication in the Atlantic and Maryland Reporters. Users are requested to notify the Clerk of the Court of any formal errors so that corrections may be made before the bound volumes go to press.

DISTRICT OF COLUMBIA COURT OF APPEALS

IN RE ESTATE OF DANIEL B. DELANEY.

No. 97-PR-1217

EDNA J. VALENTINE,



APPELLANT,

v.

LAWRENCE M. ELLIOTT, APPELLEE.

Nos. 98-PR-934, 98-PR-1104, 98-PR-1771, 99-PR-531, 99-PR-1392 & 99-PR-1619

EDNA J. VALENTINE, APPELLANT,

LAWRENCE M. ELLIOTT, APPELLEE.

Nos. 00-PR-71, OO-PR-768 & 00-PR-808

LAWRENCE M. ELLIOTT and R. ELIOT ROSEN, APPELLANTS,

v.

CHRISTOPHER G. HOGE, APPELLEE.

Nos. OO-PR-873, 00-PR-904 & 00-PR-905

Christopher G. HOGE, APPELLANT,

v.

EDNA J. VALENTINE, APPELLEE.

No. 01-PR-1469

LAWRENCE M. ELLIOTT, APPELLANT,

v.

CHRISTOPHER G. HOGE, APPELLEE.

Appeals from the Superior Court
of the District of Columbia
(ADM1809-93)
(Hon. Cheryl M. Long, Motions Judge) (Hon. Kaye K. Christian, Motions and Trial Judge)
(Argued November 18, 2002 Decided March 27, 2003)
Walter T. Charlton for appellant/appellee Valentine.
Jason P. Green for appellant/appellee Elliott and appellee Rosen.
William J. Bethune for appellant/appellee Hoge.
Before FARRELL and WASHINGTON, *Associate Judges,* and BELSON, *Senior Judge.*

BELSON, *Senior Judge:* These fourteen consolidated appeals arise out of the probate proceedings for the estate of Daniel B. Delaney (decedent). The central issues to be decided are: (1) whether a challenge to the will and a claim for status as common law wife were properly dismissed as time-barred; (2) whether certain disputed accounts were correctly determined to be part of the estate; (3) whether compensation was properly denied to the original personal representative and reduced for tax counsel to the estate; (4) whether attorneys' fees were properly denied to the estate and the residuary beneficiaries; and (5) whether the original personal representative was properly removed. We affirm all the challenged orders and judgments.

Since these appeals involve a multitude of facts not all of which are pertinent to every appeal, we begin with a brief exposition of the underlying facts. We will provide the salient facts specific to each appeal as we take up the various appeals in turn.

Mr. Delaney died on August 6, 1993, leaving behind a valuable estate; a long-time acquaintance, Edna J. Valentine, who described herself as Delaney's companion, and later in the course of litigation described herself as his common law wife; and several cousins, including Lawrence M. Elliott. Among Mr. Delaney's effects at the time of his death was a sizable account with a Virginia office of Merrill Lynch that appeared to be jointly held with Valentine.

A will, signed by Delaney on July 18,1993 ("July 18 will") and naming Valentine as sole beneficiary, was filed shortly after Delaney's death with the Register of Wills of the District of

Columbia. Elliott, designated by the will to serve as executor, mailed notice of his appointment as personal representative to Valentine on August 25,1993, and the Register of Wills admitted the July 18 will to probate on September 9, 1993.

In March of 1994, the personal representative discovered a later will, dated July 31, 1993, ("July 31 will" or "after-discovered will") and filed it with the Register of Wills. Valentine was to receive a relatively minor cash bequest under the July 31 will, with the bulk of the estate going to the National Association for the Advancement of Colored People ("NAACP"), the American Heart Association, and two other charities (collectively "residuary beneficiaries").

The July 31 will named Lawrence M. Elliott (original personal representative) as Executor, as had the July 18 will. After filing the July 31 will, Elliott published the requisite notice of after-discovered will and notice of appointment and mailed a copy of the notice (along with a form known as General Information to Heirs and Legatees) to all those named in the July 31 will, including Valentine. At the time, Elliott was unaware of several other relatives of Delaney, and so did not mail the notice or general information forms to them until much later. Valentine received her copy of the notice on March 28, 1994. The July 31 will was admitted to probate by order dated April 4, 1994, which vacated that portion of the earlier order which had admitted the July 18 will to probate. *In re Estate of Delaney,* ADM 1809-93.In August of 1997, Valentine learned "quite by accident" that Delaney had living cousins who were potential heirs. On August 13, 1997, Valentine brought this to the attention of the trial court. The trial court then stayed the case to give the newly-discovered relatives an opportunity to object to the wills. Elliott duly notified the cousins and, in September of 1997, the cousins filed a complaint to contest the validity of both wills. *Patton v. Elliott,* ADM 1809-93, order dated September 3, 1998. After being granted leave to intervene in the cousins' will contest, the NAACP located and deposed two of the witnesses to the July 31 will. Based on their testimony, the NAACP moved for summary judgment on the issue of the validity of the July 31 will. The trial court (Christian, J.) granted the motion in an order entered September 8, 1998, which was not appealed.

SECTION I: APPEAL NO. 97-PR-1217

1. Appeal-Specific Facts and Procedure

Valentine took this appeal from the trial court's order dated June 27, 1997, barring her challenges to the will as time-barred by the probate statute. D.C. Code, Title 20, §§ 20-101 through 20-1305 (1980, as amended in 1995, 1996, and 1997). Valentine is the appellant, and Elliott (personal representative at the time of the appeal) is the appellee, As Valentine later explained in a deposition, when she received her notice of the after-discovered will in March of 1994, she read the will and was immediately suspicious as to its authenticity. She felt this way because she thought Delaney was so ill that he was unable to write on the day the will was purportedly signed, and because she felt that Delaney "would never have said [what was said in the will] about me." Valentine did not act on her suspicions, however, until much later.

In June of 1995, Elliott brought a subsidiary proceeding against Valentine within the probate proceeding to recover the jointly-registered accounts as assets of the estate, claiming that the accounts were not joint accounts but simply convenience accounts.[1] *Elliott* v. *Valentine,* ADM 1809-93. On February 1, 1996, almost two years after receiving the notice as to the July 31 will, Valentine filed an answer in *Elliott v. Valentine* which "assert[ed]," *inter alia,* that the will was "a forgery and a fraud." This is the only allegation made of fraud and/or forgery in Valentine's answer.

Sometime in late 1996 or early 1997, Valentine hired a handwriting expert to examine Delaney's signatures on both the July 18 will and the July 31 will. The expert told Valentine that both signatures were forged. Valentine then filed, in *Elliott* v. *Valentine,* a motion for leave to file amending and dispositive motions, including, *inter alia, a* motion to vacate probate order based on new evidence of fraud and common law marriage. She filed this motion on March 17, 1997, almost three years after she received the notice of appointment. In this filing, Valentine

---

[1] This issue is also the subject of these consolidated appeals.

made extensive claims of forgery regarding the July 31 will. By order dated March 31, 1997, the court rejected Valentine's challenge to the July 31 will as time-barred. In the order, the court noted that in oral argument held on January 23, 1997, in *Elliott* v. *Valentine,* as well as in the February 1,1996, answer Valentine filed in that case, Valentine challenged the July 31 will as a forgery and fraudulent.

Notwithstanding the court's ruling of March 31, 1997,Valentine filed, on April 7, 1997, a complaint in the nature of a caveat attacking the validity of both the July 18 will and the July 31 will on the grounds of fraud and/or forgery. She also realleged that she was decedent's common law wife. By order entered June 27, 1997, the trial court dismissed Valentine's renewed claims of forgery and her claim to be decedent's common law wife as time-barred under D.C. Code § 20-903 (a)(l) (1981)[2] Valentine took appeal No. 97-PR-1217 from this order; Elliott (personal representative at the time of the appeal) is the appellee.

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[2] In its order dismissing the fraud/forgery claim as time-barred, the trial court reffered to D.C. Code 20-93 (a)(1) as the "controlling statue." Section 20-903 (a)(1) states:

(1) all claims against a decedent's estate, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or other legal basis, shall be barred against the estate, the personal representative, and the heirs and legatees, unless presented within 6 months after the date of the first publication of notice of the appointment of a personal representative.

Thus, § 20-903 (a)(l) refers only to claims by creditors, not challenges to the validity of the will brought by heirs and legatees. *In re Estate of Derricotte,* 744 A.2d 535 (D.C. 2000). *Cf. District of Columbia* v. *Gantt,* 558 A.2d 1120 (D.C. 1989) (allowing claim against decedent husband's estate for care and maintenance of decedent's wife at public mental health hospital); *In re Estate of Phillips,* 532 A.2d 654 (D.C. 1987) (allowing claim for attorneys' fees against estate). The court apparently intended to refer to D.C. Code § 20-305, which we discuss below.

2. Discussion

A. Jurisdiction

Although appeal No. 97-PR-1217 may have been premature when filed[3] a final judgment was entered in *Elliott v. Valentine* on October 20, 1999. This had the effect of ripening the instant appeal thereby giving this court jurisdiction to act because the trial court had entered a final judgment on the entire case. Super. Ct. Civ. R. 54; *West* v. *Morris,* 711 A.2d 1269, 1271 (D.C. 1998); *Dyer* v. *William S. Bergman &Assocs., Inc.,* 635 A.2d 1285, 1286-87 (D.C. 1993); *Robinson* v. *Howard Univ.,* 455 A.2d 1363, 1366 (D.C. 1983).

B. Standard of Review

The trial court's ruling rejecting appellant Valentine's challenge to the will as time-barred constituted an adjudication of that issue. Although her challenge to the July 31 will arose in the context *of Elliott* v. *Valentine,* it was properly a part of *In re Estate of Delaney* because the issue in *Elliott v. Valentine* concerned the nature of the jointly-registered accounts. The validity of the July 31 will had no bearing on the nature of those accounts, Had Valentine lodged her complaint against the July

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[3] This court does not have jurisdiction to hear an appeal unless the order appealed from is a final order. D.C. Code § 11-721 (a)(l) (1981). Appeal No. 97-PR-1217 was filed immediately after the entry of the trial court's June 27,1997, order dismissing as time-barred appellant Valentine's renewed claims of forgery and her claim to be decedent's common law wife. Although the June 27 order was not the final order in *Elliott v. Valentine,* it might have been construed as final under the collateral order doctrine. Because the appeal has since ripened with the entry of final judgment in *Elliott* v. *Valentine,* we will not consider the applicability of the collateral order doctrine here.

31 will within the probate proceeding itself (/n *re Estate of Delaney),* rather than in a subsidiary proceeding, the order denying her caveat to the will would have functioned as a summary judgment that the July 31 will was properly admitted to probate. We make an independent, *de novo* review of the record in deciding appeals from summary judgment. *See, e.g., In re Burleson,* 738 A.2d 1199,1203-04 (D.C. 1999); *Knight* v. *Furlow,* 553 A.2d 1232,1233 (D.C. 1989). In so doing, we use the trial court's standard of review for motions for summary judgment. *Knight, supra,* 553 A.2d at 1233. Summary judgment is appropriate when there is no genuine issue as to a material fact and the movant is entitled to a ruling as a matter of law on the issue in question. Super. Ct. Civ. R. 56 (c). The court must view the record in the light most favorable to the party opposing the motion for summary judgment and resolve any doubts as to the existence of a factual dispute in that party's favor. *Duggan* v. *Keto,* 554 A.2d 1126, 1131 (D.C. 1989). Thus, we review the record *de novo,* resolving any doubts as to the existence of a factual dispute in favor of appellant Valentine.

.C. **Appellant Valentine's Challenge to the Validity of the July 31 Will**

On appeal, appellant Valentine presents three alternative theories under which her challenge to the July 31 will is not time-barred. First, she suggests that because she is claiming that the will is a fraud, she should be given the benefit of the discovery rule. Alternatively, she suggests that the three-year civil statute of limitations for fraud should be applied rather than the six-month limitation on bringing challenges to a will. As a final option, she proposes that the late notification of after-discovered heirs of Delaney "restarted" the time for appellant Valentine's caveat as of the date of the late notification.

(1) The Discovery Rule

D.C. Code § 20-305 states "any person may file a verified complaint to contest the validity of a will *within 6 months* following *notice* by publication *of the appointment of a*

personal representative.'" D.C. Code § 20-305 (emphasis added). Appellant Valentine does not dispute the fact that she received the notice pertaining to the July 31 will in March of 1994. To excuse the length of her delay, she seeks to toll the will contest statute of limitations by invoking the discovery rule. In support of her theory, appellant Valentine cites *Johnson* v. *Martin,* 567 A.2d 1299,1302 (D.C. 1989), where we dealt with the discovery rule in the context of a late objection to an accounting in a probate case.

Valentine is correct that we have allowed the use of the discovery rule in the probate context. Within probate cases the discovery rule has been applied with regard to (1) contesting a personal representative's power to pay expenses relating to devised realty from the residuary estate, *see id.;* (2) claims of fraud and breach of fiduciary duty under a testamentary trust, *see Interdonato v. Interdonato,* 521 A.2d 1124 (D.C. 1987); and (3) a dispute over two paintings claimed to be estate assets, *see In re Estate of McCagg,* 450 A.2d 414 (D.C. 1982). We have not applied the discovery rule to will contests involving claims of fraud. *Interdonato,* however, appears to leave open the possibility of such a use of the discovery rule. One of the many claims brought in *Interdonato* was an allegation that the decedent's will had been altered before it was offered for probate - essentially a challenge to the will on the basis of fraud. We ruled that the claim (which was brought nineteen years after the will had been admitted to probate) was barred by laches, rather than by any time bar within the statute. *Interdonato, supra,* 521 A.2d at 1138. A laches determination includes an analysis of whether or not the delay was excusable. This examination is quite similar to a discovery rule analysis.

Although the probate codes of many jurisdictions contain tolling exceptions for fraud to extend the time limit on contesting wills, ours does not. Other jurisdictions have dealt with statutes similar to ours in a variety of ways. *See* Eliot J. Katz, Annotation, *Fraud as Extending Statutory Limitations Period for Contesting Will or Its Probate,* 48 A.L.R. 4th 1094 (1986). Some have hewn strictly to the statutory language and refused to grant late challenges on the grounds of fraud. These

courts reasoned that because the right to contest a will existed only by statute, any challenge to a will could be exercised only within the time limits prescribed by the statute. In addition, these courts considered that the best way to carry out the statute's purpose, which was to ensure the prompt and orderly settlement of estates and to avoid confusion and consequences injurious to the rights and titles of interested parties, was to abide strictly by the statutory deadline regardless of the type of fraud alleged. *See, e.g., Criscoe* v. *Derooy,* 384 A.2d 627 (Del. Ch. 1978); *Robinson v. First State Bank of Monticello,* 454 N.E.2d 288 (111. 1983); *Ruffing v. Glissendorf,* 243 N.E.2d 236 (111. 1968); *In re Estate of Thompson,* 346 N.W.2d 5 (Iowa 1984).

Other courts have allowed application of the discovery rule for claims of fraud under a probate statute that contained no express tolling provision for fraud. Reasoning that time limitations in the will contest statute did not strip the probate court of its authority to review its own orders of probate, and that a will signed with a forged signature or obtained by undue influence works a fraud on the Register of Wills and on the court, these courts have allowed the use of the discovery rule for claims of intrinsic fraud brought after the statutory time limit for contesting a will.[4] *See, e.g., Padgett* v. *Estate of Padgett,* 318 So. 2d 484 (Fla. Dist. Ct. App. 1st Dist. 1975); *Estate of Colucci,* 492 A.2d 1155 (Pa. Super. Ct. 1985).

We find persuasive the reasoning of this last line of cases. The probate of a will that is a product of intrinsic fraud such as forgery practices a fraud on the probate court and on at least

---

[4] Although the terms "intrinsic fraud" and "extrinsic fraud" are sometimes employed loosely, "intrinsic fraud" is generally used to describe fraud which arises within the court proceeding and concerns an issue that speaks directly to a determination on the merits. Examples would be undue influence, fraud in obtaining the will and a forgery within the will. "Extrinisic fraud," however, usually refers to the manner in which a judgment is obtained and concerns matters not directly in issue. An example would be fraud practiced on a party to the proceeding which prevents him or her from presenting a case. *See, e.g., In re Will of Evans,* 264 S.E.2d 387, 389 (N.C. Ct. App. 1980).

some of the parties to the case. Although the District of Columbia has a strong interest in prompt and efficient probate for estates, it has an even stronger interest in ensuring that a will admitted to probate is not the result of fraud. Thus it seems appropriate to allow the use of the discovery rule for belated will contests based on claims of intrinsic fraud.

Although we hold that the discovery rule can be used to bring a late will contest based on a claim of intrinsic fraud, our holding does not help appellant Valentine. Valentine claims to have "discovered the forgery" in "late February 1997" when she received an expert opinion report that the signature on the July 31 will was a forgery. She filed her "Objection in the Form of a Motion Alleging Fraud and Request for an Evidentiary Hearing" less than a month later, on March 7, 1997. Application of our precedents to what transpired in this case demonstrates that Valentine was chargeable with notice of any alleged fraud from before February of 1997.

"When one person defrauds another, there will be a delay between the time the fraud is perpetrated and the time the victim awakens to the fact." *Kropinski v. World Plan Executive Council-US,* 272 U.S. App. D.C. 17, 19, 853 F.2d 948, 955 (1988). Because of this inherent delay, "a cause of action [for fraud] accrues for purposes of the statute of limitations when the plaintiff has either actual notice of her cause of action or is deemed to be on inquiry notice because if she had met her duty to act reasonably under the circumstances in investigating matters affecting her affairs, such investigation, if conducted, would have led to actual notice." *Diamond v. Davis,* 680 A.2d 364, 372 (D.C. 1996). *See also Kropinski, supra,* 272 U.S. App. D.C. at 19, 853 F.2d at 955 ("[I]n a fraud case, the statute of limitations will not begin running until the date the fraud is discovered, or reasonably should have been."); *Mullin* v. *Washington Free Weekly, Inc.,* 785 A.2d 296,299 (D.C. 2001) (citing *Colbert v. Georgetown Univ.,* 641 A.2d 469,472-73 (D.C. 1994)) ("the statute of limitations will not run until plaintiffs know or reasonably should have known that they suffered injury due to the defendants' wrongdoing"). "The discovery rule does not, however, give the plaintiff *carte blanche* to defer legal action indefinitely if she knows or should know that she may have suffered injury and that the defendant

may have caused her harm." *Colbert, supra,* 641 A.2d at 473. What constitutes acting reasonably under the circumstances to investigate the problem is a "highly factual analysis," *Diamond, supra,* 680 A.2d at 372, but usually requires that the injured party be ignorant of the fraud through no "fault or want of diligence or care on his part." *Id.* at 373 (internal citations omitted). Thus, "the focus of the rule is on when [the plaintiff] gained *general* knowledge [that she had been injured], not on when she learned of the *precise* legal remedies [for the injury]. *East v. Graphic Arts Indus. Joint Pension Trust,* 718 A.2d 153, 157 (D.C. 1998) (emphasis in original). *See also Ray v. Queen, 1A1* A.2d 1137,1142 (D.C. 2000) (distinguishing between discovery rule and tolling doctrine).

Turning to the timing of relevant events in this case, we see that Valentine received notice of the July 31 will on March 28, 1994. In a deposition, she admitted reading the will and having immediate suspicions as to its authenticity because, she said, Delaney was no longer able to write on the day the will was purportedly signed, and because she felt that Delaney "would never have said [what was said in the will] about me." Valentine's immediate suspicions about the will placed upon her the obligation to move promptly and with reasonable diligence to inquire further into the matter. Instead of making a reasonable, prompt, and diligent inquiry, Valentine did nothing from March 28, 1994, until the end of 1996 or early 1997 when she engaged the services of a handwriting expert. This hardly constitutes reasonable diligence on her part. For our purposes here, we need not determine precisely how soon after March 28, 1994, Valentine, for the purposes of reasonable diligence, should have concluded her inquiry into the circumstances surrounding the execution of Delaney's will of July 31, 1993, for it is clear that a reasonably diligent inquiry could have been completed substantially more than six months before Valentine filed her
attack on the will in March of 1997. Under the probate statute,

that statutory clock ran out six months after such inquiry could have been concluded. Therefore, even allowing full play for the discovery rule in applying § 20-305, Valentine's attack on the

will in March of 1997 came far too late.

(2) Statute of Limitations for Civil Fraud

As an alternative theory for allowing her to mount a will contest, Valentine argues that the presence of fraud in the making of the will, *e.g.*, securing Delaney's signature on it at a time when he could not write, invokes the probate court's equity jurisdiction and allows it to use the statute of limitations for civil fraud. Under D.C. Code § 12-301, the time limit for bringing an action for forgery or fraud is three years. D.C. Code § 12-301 (8). Many courts have held that a provision in the general statutes of limitations for fraud does not apply to a will contest when the statute governing wills contains its own limitations provision. This is because a will contest is purely a creature of statute, is not derived from common law causes of action, and therefore should be governed by statutes of limitations provisions in its creating statute rather than those derived from the common law. *See, e.g., Riddell* v. *Edwards,* 32 P.3d 4, 8 (Alaska 2001) ("[W]ill contests are unknown to the common law and exist only as permitted by statute." (internal quotations omitted)); *Estate of Kitterman* v. *Pierson,* 661 N.E.2d 1255, 1257 (Ind. Ct. App. 1996) ("The right to contest a will is statutory."); *In re Estate of Thompson,* 346 N.W.2d 5, 7 (Iowa 1984) (declining to apply doctrine of fraudulent concealment so as to extend time for challenging wills which have been admitted to probate); *Miller v. Munzer,* 251 S.W.2d 966 (Mo. Ct. App. 1952); *In re Peterson, 9* P.3d 845, 850 (Wash. Ct. App. 2000) ("Will contests are statutory proceedings and courts must be governed by the provisions of the applicable statutes," rather than by the rules of civil procedure (internal quotations and citations omitted)).

Other courts have shown themselves reluctant to apply civil statutes of limitation to probate proceedings because to do so would run directly counter to the state's strong interest in the orderly settlement of estates. *See, e.g., Pedersen v.*

Dempsey, 93 N.E.2d 85, 86 (111.App. 1950).[5]

On the whole, it seems most reasonable to us to use only the will-contest statute of limitations for probate cases. Since the probate code itself sets forth a period of limitations for contesting a will, there is neither need nor reason to look elsewhere for a different time limitation. Furthermore, if we read the three-year statute of limitations for civil fraud into the probate statute, that three-year period might be further extended by application of the discovery rule. This could unleash grave uncertainty into the world of probate. Under this approach, a plaintiff conceivably could reopen a probate case years after it was closed and after the estate had been distributed. This is directly contrary to the District's strong policy interest in the orderly settlement of estates. We hold that the statute of limitations for fraud embodied in D.C. Code § 12-301 (8) does not apply to will contests under the probate code. Therefore, the six months limitation period of the probate statute applies.

(3) Restarting the Statutory Clock

As a final alternative theory for allowing her challenge to the July 31 will, Valentine proposes that the late notification of after-discovered heirs of Delaney "restarted" the time for the filing of her caveat as of the date of the late notification. However, Valentine cites no support for this proposition, and we are aware of none. The relevant statute clearly states that the interested party has six months from the time of publication of the notice of appointment within which to challenge the will. Valentine refers us to nothing in our cases or the statute that can

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[5] We take note of few cases where courts have applied the statute of limitations for civil fraud, but also note that they were not will contests and did not involve allegedly forged or fraudulent wills. *See, e.g., Succession of Hearn,* 415 So. 2d 215 (La. 1982) (testator's daughter not provided with notice of probate proceedings because executrix filed false documents regarding existence of descendants); *Schoen v. Burns,* 321 So. 2d 908 (La. App. 1975) (fraudulent concealment of existence of an heir).

be read to mean that if the notice is published again for the benefit of other interested parties, the later publication becomes a new publication date for parties who already received notice.

D. Common Law Wife Claim

In addition to challenging the will as the product of fraud, Valentine's motion dated March 17, 1997, also claimed, for the first time, that she was Delaney's common law wife. This claim is not barred under D.C. Code § 20-305 because it does not contest the validity of the will.[6] Presumably, Valentine asserted that she was decedent's common law wife so that she could claim a spouse's statutory share of the estate, a claim she could make regardless of the validity of the will.

D.C. Code § 19-113 (a) provides a six-month period from the time the will is admitted to probate for a surviving spouse to renounce "any devise or bequest made ... by the last will of my husband" and to "elect to take in lieu thereof my legal share of the real and personal estate of my deceased spouse." This period does not begin to run until the end of any action to *construe* the will of the decedent (D.C. Code §19-113 (c) (2001)), but that is the only tolling provision provided in the statute. In other words, the statute is not tolled for an individual who suddenly "discovers" that she was the decedent's common law wife three years after a will is admitted to probate.[7] Since appellant Valentine could be attempting to claim common law wife status only for the purpose of electing a statutory share of the estate, and since any election of the statutory share is clearly time-

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[6] D.C. Code § 20-305 stated , "any person may file a verified complaint to contest the validity of a will within 6 months following notice by publication of the appointment... of a personal representative." D.C. Code § 20-305 (2001).

[7] The discovery rule has no application here. Appellant Valentine is not claiming that her delay in discovering that she might be Delaney's common law wife was caused by fraud or that facts about her relationship with Delaney, unknown to her during his lifetime, came to her attention well after his death.

barred, appellant Valentine's assertion of common law wife status is time-barred as well.

In light of the foregoing, we affirm the trial court's order dated June 27, 1997, dismissing both the challenge to the will and the common law wife claim as time-barred.

SECTION II: APPEAL NOS. 98-PR-934; 98-PR-1104; 98-PR-1771; 99-PR-531; 99-PR-1392 & 99-PR-1619

1. Appeal-Specific Facts and Procedure

This set of six appeals stems from various aspects of the trial court's decisions as to the disputed Virginia accounts. As noted above, Elliott filed a subsidiary proceeding within the probate proceeding against Valentine in June of 1995 *(Elliott v. Valentine)* to recover funds in two accounts on behalf of the estate. The accounts in question were a credit union account and a Merrill Lynch cash management account. Both accounts were maintained in Virginia and established with funds contributed entirely by decedent Delaney. The credit union account was opened in 1986. Although the names of both Delaney and Valentine appear on the account card filled out by Valentine, Delaney's social security number was the only personal identification number to appear on the account. Delaney, the sole depositor, never signed the card entitled "joint account" and never made a joint account election. Quarterly statements were sent only to Delaney, who was the sole taxpayer on the income from the account.Delaney had opened the Merrill Lynch account in 1962, and it contained the bulk of his liquid assets. This account was registered solely in Delaney's name until four days before his death on August 6, 1993. On July 19, 1993, the day Delaney was transferred to a different hospital to undergo a new round of treatment, he executed a power of attorney appointing Valentine as his attorney in fact for convenience in maintaining his property and to use his property for his care, support and maintenance. Merrill Lynch did not honor this power of attorney, and Valentine could not use it to write checks on that account to pay Delaney's bills. With her assistance, on July 28, 1993, Delaney completed the paperwork to change the Merrill Lynch account to a joint account, by

establishing a new, joint account, in his name and hers so that she could pay his bills. Three days later, on July 31, 1993, decedent signed the will that was eventually admitted to probate, which stated "all I own in any form is my property, with no pre-death gift intended." Valentine transferred the funds from Delaney's original Merrill Lynch account to the new joint account on August 2,1993, three days before his death.

Immediately after Delaney's death, Valentine transferred the funds again, this time to a new joint account in the names of Valentine and her daughter. Valentine then began spending the funds and transferring funds to her children.

As personal representative, Elliott sued Valentine on behalf of Delaney's estate, contending that the Virginia accounts were not joint accounts but simply convenience accounts and therefore part of the estate. After Valentine answered Elliott's complaint, Elliott filed a motion seeking a summary judgment that the estate was entitled to the return of the proceeds of the Merrill Lynch and credit union accounts, ordering an accounting, directing Valentine to divest herself of all funds and other assets that had been Delaney's or were acquired with his funds, and for other relief. Elliott filed this motion one day after the deadline for such filings, and the court rejected it. Elliott then filed a motion for consideration of his motion for summary judgment which was, in effect, a motion to permit the filing of the motion after the deadline. When the parties appeared before the court for a hearing on January 23, 1997, and the court undertook to hear argument on Elliott's motion for summary judgment, Valentine's counsel indicated that he had understood that the hearing was not on the motion for summary judgment, to which he had not filed an opposition, but merely on Elliott's motion to permit the late filing of the motion for summary judgment.[8] While counsel's reading of the court's order

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[8] Oddly, on the day after the hearing, Valentine's counsel filed with the court a "Summary of Status of Pending Motions," in which he indicated that the January 23 hearing would deal with Elliott's motion for consideration of his motion for summary judgment. Valentine's counsel certified that he had served the summary on Elliott's counsel on the day of the hearing. Yet Valentine's counsel never mentioned the summary to the judge during the

scheduling the hearing was plausible, the court intended its order to schedule a hearing on the motion for summary judgment itself. Without seeking a continuance or leave to file a written opposition, Valentine's counsel argued against granting the motion for summary judgment. Valentine prevailed in her opposition to summary judgment on the merits of the issue of the estate's entitlement to a return of the proceeds of the two Virginia accounts. The court, however, granted the estate's motion with respect to an accounting and the creation of an escrow account.

Following the hearing, on January 24, 1997, the trial court issued an order requiring Valentine to place the disputed funds in the court registry. On January 27, 1997, the court issued an order in *Elliott v. Valentine* appointing an auditor and requiring an accounting of the disputed funds.

On August 13, 1997, Valentine brought Delaney's newly-discovered relatives to the attention of the trial court. Once the court learned of Delaney's additional relatives, it stayed *Elliott v. Valentine* (the action instituted by Elliott to procure the Virginia accounts) to give the newly-discovered relatives an opportunity to object to the wills. The cousins were duly notified by Elliott and, in September of 1997, the cousins filed a complaint to contest the validity of both wills *(Patton* v. *Elliott).* Two of the charities that are beneficiaries under the July 31 will sought to intervene in *Patton* v. *Elliott.* By orders issued February 4 and February 20, 1998, the trial court allowed the American Cancer Society and the NAACP to intervene in *Patton v. Elliott.* Sometime after that order was issued, Valentine sought to intervene in *Patton v. Elliott,* but the court denied her motion to intervene in an order dated May 20, 1998. This order was subsequently appealed (No. 98-PR-l 104). On the same day, the trial court ordered Valentine to pay the auditor's fees in *Elliott v. Valentine,* and Valentine appealed that order as well (No. 98-PR-934).

In the summer of 1998, the NAACP moved for summary judgment i*n Patton v. Elliott.* By order issued September 8,

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hearing. The circumstances raise the question of when the summary was prepared.

1998, the trial court granted the NAACP's motion. This order was not appealed. In November, the trial court issued a consent order requiring Valentine to pay the auditor's fees, and Valentine noted yet another appeal (No.98-PR-1771).

On March 23, 1999, the trial court issued its findings of fact and conclusions of law on the issue of whether or not the accounts were a part of the Delaney estate. Valentine noted an appeal from the trial court's findings of fact and conclusions of law (No. 99-PR-531). (Although it was premature, this appeal has since ripened.) On October 20, 1999, the trial court issued its order of judgment which Valentine appealed (No. 99-PR-1392). Valentine also moved for a stay of enforcement of the judgment pending the results of appeal No. 99-PR-1392, but the trial court denied the stay in an order dated November 1, 1999. Valentine appealed the order denying the stay as well (No. 99-PR-1619).

Valentine has failed to address the issues raised in some of her multitude of appeals in the briefs she submitted, as is required by our rules. D.C. App. Ct. R. 28 (a)(5). Not addressed are: the appeal from the order to pay auditor's fees (No. 98-PR-934), the appeal from the denial of Valentine's motion to intervene in *Patton* v. *Elliott* (No. 98-PR-l 104), the appeal of the consent order requiring payment of auditor's fees (No. 98-PR-1771), and the appeal from the denial of the request for a stay of enforcement (No. 99-PR-l 619). We deem these appeals abandoned and dismiss them. D.C. App. R. 14. What remain are Valentine's appeals from the March 23, 1999, findings of fact and conclusions of law (No. 99-PR-531), and the October 20, 1999, judgment and judgment order (No. 99-PR-l 392). Christopher Hoge (successor personal representative) is the appellee in those appeals.

Valentine argues that the trial court: (1) lacket jiurisdiction to determine whether the accounts were part of the estate: (2) erred in its choice of law determination: (3) erred in determining that the accounts were part of the estate: and (4) violated her constitutional due process rights and freedom of contract rights when it required her to deposit the disputed funds into the court

registry.[10]

2. Discussion

A. Standard of Review

This court reviews choice of law questions *de novo. Herbert v. District of Columbia,* 808 A.2d 776, 779 (D.C. 2002); *Vaughan* v. *Nationwide Mut. Ins. Co.,* 702 A.2d 198, 200 (D.C. 1997) (citing *Hercules & Co. v. Shama Rest. Corp.,* 566 A.2d 31, 40 (D.C. 1989)); *Atkins v. Industrial Telecomms. Ass'n,* 660 A.2d 885, 888 (D.C. 1995).

B. Trial Court's Jurisdiction to Determine Whether the Accounts were Part of the Estate

Valentine asserts that the trial court had no jurisdiction to determine whether the accounts maintained in Virginia were part of the estate. We cannot agree. The Probate Division of the Superior Court has subject matter jurisdiction over the estate of any decedent who was domiciled in the District at the time of death. *Lipscomb* v. *Lipscomb,* 105 U.S. App. D.C. 240,265 F.2d 822 (1959) (unless decedent was domiciled in District of

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[10] Valentine also claims there was a conspiracy among the probate clerk, the judges of the probate court and Elliott in violation of 42 U.S.C. 1983, 1985 and 1986. This issue is being raised for the first time on appeal, and we need not consider it. *Barrera v. Wilson,* 668 A.2d 871 (D.C. 1995). The only exceptions to this rule are extraordinary cases where the possibility of injustice exists. *Wagshal* v. *District of Columbia,* 430 A.2d 524 (D.C. 1981). Arguments that have little, if any, merit are not sufficient to create an exception. *Eastern Indem. Co. v. Content,* 543 A.2d 1361, 1363 (D.C. 1988). Appellant Valentine recites only unsupported allegations and provides no showing that she was entitled to use the funds that were placed into the court registry. Since no injustice will result from refusing to hear this belated § 1983 claim, we decline to address it.

Columbia, District courts are without jurisdiction to probate will); *In re Estate of Dapolito,* 331 A.2d 327 (D.C. 1975) (jurisdictional issue related to whether decedent was domiciled in District of Columbia). *See also* REPORT OF THE COMMITTEE ON THE JUDICIARY RE: DISTRICT OF COLUMBIA PROBATE REFORM ACT OF 1980, p. 11 (explaining that Superior Court "may exercise jurisdiction over the estate of a person domiciled in the District"). Clearly, the trial court had subject matter jurisdiction over the estate.

Since the court had general subject matter jurisdiction over the estate, it also had more specific subject matter jurisdiction over the dispute as to ownership of the funds from the jointly-registered accounts because the dispute was a "claim . . . existing between" the executor and a legatee. D.C. Code §11-921 (a)(5)(A)(vi). Indeed, Valentine's counsel at the time conceded the court's general subject matter jurisdiction at the January 23, 1997, hearing when he said "I don't think we've ever disagreed with this Court's right to determine... and jurisdiction to determine who is the owner of those funds."

Valentine also argues on appeal that the court erred in failing to hold an evidentiary hearing on the issue of its jurisdiction over the accounts prior to making any other determinations. Her brief cites five cases in support of this proposition, only two of which have even limited relevance. Both of these cases hold that in probate matters where there is a dispute as to the domicile of the decedent, the court must address the question of subject matter jurisdiction first. *See Lipscomb, supra,* 105 U.S. App. D.C. at 240, 265 F.2d at 822; *Dapolito, supra,* 331 A.2d at 327. There was no dispute here as to Delaney's domicile at the time of his death. Furthermore, far from contesting jurisdiction, Valentine conceded it at the January 23, 1997 hearing. The court was not required to hold a hearing on the matter of its jurisdiction over the estate.

28 C. <u>The Choice of Law Determination</u>

(1) <u>Preliminary Matter</u>

Faced with a conflict of law situation, a court's first step must be to determine which area of law is presented by the underlying issue (torts, property, contracts, etc.). Appellant Valentine has asserted that the conflict of law issue should be resolved as though the dispute over the accounts involved property rights or, alternatively, as though the case were a contract case. This is not, however, a case involving property, nor is it a contract issue. Although the forms relating to the joint accounts constituted a contract between Delaney and Merrill Lynch, we are not being asked to construe or enforce that contract. The issue here is one of probate law - whether or not the accounts in question pass within the estate or outside the estate. Thus it is appropriate to begin by considering whether there is a conflict between District of Columbia probate law and Virginia probate law on the manner in which they treat joint accounts.

(2) <u>The District's Choice of Law Principles</u>

In determining which jurisdiction's law will apply to substantive issues, District of Columbia courts use a government interest analysis which requires first a court evaluation of the governmental policies underlying the applicable conflicting laws and then a determination as to which jurisdiction's policy would be most advanced by having its law applied to the facts of the case. *See Felch* v. *Air Florida, Inc.,* 275 U.S. App. D.C. 403, 866 F.2d 1521, 1523 (1989) (citing *Williamsv. Williams, 390* A.2d4,5-6(D.C. 1978)). *Seealso Stutsman v. Kaiser Found. Health Plan of Mid-Atlantic States, Inc.*, 546 A.2d 367, 372 (D.C. 1988); *Rong Yao Zhou* v. *Jennifer Mall Rest., Inc.,* 534 A.2d 1268, 1270-71 (D.C. 1987); *Gaither v. Myers,* 131 U.S. App. D.C. 216,404 F.2d 216,222-24 (1968). "When the policy of one state would be advanced by application of its law, and that of another state would not be advanced by application of its law, a false conflict appears and the law of the interested state prevails. Where each state would have an interest in the application of its own law to the facts, a true conflict exists and the law of the jurisdiction with the stronger interest will apply." *Biscoe v. Arlington County,* 238 U.S. App. D.C. 206, 738 F.2d 1352, 1360 (1984) (footnote

omitted), *cert, denied,* 469 U.S. 1159 (1985). Using this analysis, "this Court applies another state's law when (1) [the other state's] interest in the litigation is substantial, and (2)' application of District of Columbia law would frustrate the clearly articulated public policy of that state.'" *Herbert, supra,* 808 A.2d at 779 (citing *Kaiser-Georgetown Cmty. v. Stutsman,* 491 A.2d 502, 509 (D.C. 1985)).

In an effort to avoid creating a "ready means of producing fraud and injustice," *Imirie* v. *Imirie,* 100 U.S. App. D.C. 371, 372,246 F.2d 652,653 (1957), the District of Columbia presumes that a joint account opened by an individual for himself and another, where the individual who opened the account provided all the funds therein deposited, was opened for the convenience of the decedent-depositor. *Davis* v. *Altmann,* 492 A.2d 884, 885 (D.C. 1985). This presumption holds true even where the printed bank cards signed by both parties recite a right of survivorship. *Imirie, supra,* 100 U.S. App. D.C. at 372, 246 F.2d at 653.

In contrast, Virginia, in a departure from its common law, has created statutory presumptions that (1) sums of money "on deposit at the death of a party to a joint account belong to the surviving party... as against the estate... unless there is clear and convincing evidence of a different intention at the time the account is created," VA. CODE ANN. §6.1-125-5.A (2002), and (2) any joint tenancy of real or personal property functions as a tenancy in common upon the death of one of the tenants. VA. CODE ANN. § 55-20.[11] This last section does not apply, however, "when it manifestly appears from the tenor of the instrument. .. that it was intended the part of the one dying should then belong to the others." VA. CODE. ANN. § 55-21 (2002). Both § 55-20 and § 55-21 have been held to apply to

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[11] Virginia's code states, "When any joint tenant dies ... whether the estate is real or personal... his part shall descend to his heirs, or pass by devise, or go to his personal representative, subject to debts or distribution, as if he had been a tenant in common." VA. CODE ANN. § 55-20.

investment accounts.[12] *Buck* v. *Jordan,* 508 S.E.2d 880, 883 (Va. 1998). Thus, while Virginia starts with a presumption of either joint tenancy with survivorship (for cash in bank accounts) or tenancy in common (for property and brokerage accounts), it is willing to look at the language of the forms creating the account and surrounding circumstances to determine whether the decedent-depositor intended a joint account with right of survivorship. Virginia did this to meet the expectations of parties signing the forms to create a joint account (when those forms include survivorship language),[13] create consistency in its law, and protect its financial institutions.[14]

Since there is a clear conflict between the public policies of the two jurisdictions, and since both jurisdictions have an interest in applying their law to the facts in this case, "a true conflict exists and the law of the jurisdiction with the stronger interest will apply." *Biscoe, supra,* 238 U.S. App. D.C. at 214, 738 F.2d at 1360 (footnote omitted). The District has a strong

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[12] It seems clear that Virginia Code § 6.1-125.5 applies to the credit union account. It is less clear whether Virginia Code § 6.1-125.5 or § 55-20 would apply to the Merrill
Lynch account. This is because the Merrill Lynch account was a brokerage account in addition to being a cash management account, and brokerage accounts do not qualify as accounts for the purposes of § 6.1-125.5 under § 6.1-125.1(1) (the definitional section). VA. CODE ANN. §§ 6.1-125.1 and 6.1-125.5. *See also Bennet v. First & Merchants Nat'l Bank,*
(continued...)

[13] *See* Barbara M. Rose, *Multiple-Party Accounts: Does Virginia's New Law Correspond with the Expectations of the Average Depositor?,* 14 U. RICH. L. REV. 851,856 n.29 (1980) (citing Report of the Multiple-Party Deposit Accounts Committee of the Virginia Bar Association, Meeting of September 18, 1978, at 2 (Sept. 18, 1978)).

[14] Id. At 865.

interest in preventing "fraud and injustice," *Imirie, supra,* 100 U.S. App. D.C. at 372, 246 F.2d at 653. Indeed, "the public policy considerations for the presumption of a convenience account are of the highest magnitude." *Davis v. Altmann, supra,* 492 A.2d at The District also has a strong interest in the orderly completion of probate for the estate of a decedent who is a domiciliary of the District.

Virginia's interest is less pronounced since the expectation interests of the parties and the convenience of estate administration cannot readily be characterized as being of the "highest magnitude." Indeed, the Virginia Code essentially acknowledges that Virginia's interest is weaker, because it releases Virginia's jurisdiction over property such as the two accounts here so long as certain procedures are followed. Under the Virginia Code, the administrator of a nonresident decedent's estate may claim "stocks, bonds, securities, money or tangible personal property located in" Virginia after following notification procedures. VA. CODE ANN. § 64.1-130 (2002).

On balance, then, the District's interests are substantially stronger, and its law governs. *Biscoe, supra,* 238 U.S. App. D.C. at 214, 738 F.2d at 1360 (footnote omitted). The trial court was correct in applying District of Columbia law to determine whether or not the accounts were part of the estate.

D. Status of the Accounts Under the Law of the District of Columbia

In the District of Columbia, "[w]here a party opens a joint account for himself and another without consideration, the account is presumed opened for the convenience of that party." *Davis* v. *Altmann, supra,* 492 A.2d at 885. *See also Murray* v. *Gadsden,* 91 U.S. App. D.C. 38,44,197 F.2d 194,200 (1952); *Edstrom v. Kuder,* 351 A.2d 506,509 n.7 (D.C. 1976). This convenience account presumption always applies where the funds were deposited by only one of the parties, even where the printed bank card signed by the parties recites a right of survivorship. *Imirie, supra,* 100 U.S. App. D.C. at 372, 246 F.2d at 653. The presumption puts the person who is claiming that the account carried a right of survivorship in the position of claiming that the account funds were an *inter vivos* gift, and

shifts the burden of proof to that person. *Harrington v. Emmerman,* 88 U.S. App. D.C. 23, 27, 186 F.2d 757, 761 (1950); *Duggan, supra,* 554 A.2d at 1 \34;*Davis v. Altmann, supra,* 492 A.2d at 885. When the claim of an *inter vivos* gift comes after the alleged donor had died, the gift must be proven by clear and convincing evidence. *Uckele v. Jewett,* 642 A.2d 119, 123 (D.C. 1994); *Duggan, supra,* 554 A.2d at 1134; *Estate ofPresgrave* v. *Stephens,* 529 A.2d 274,280 (D.C. 1987).

Both the credit union and the Merrill Lynch accounts were presumptively convenience accounts since all the funds on deposit in both accounts were provided by Delaney. This left appellant Valentine in the position of having to prove, by clear and convincing evidence, that the accounts were intended as *inter vivos* gifts. The requisites of a valid *inter vivos* gift are delivery, intention on the part of the donor to make a gift, and absolute disposition of the subject of the gift. *Uckele, supra,* 642 A.2d at 123; *Duggan, supra,* 554 A.2d at 1134. Appellant Valentine simply did not have such evidence to present as to either account.

The credit union account agreement lacked signatures for the joint and survivor election, and the July 31 will specifically bequeathed the account to Valentine, a clear indication that Delaney did not think he had given her the account during his lifetime. The Merrill Lynch account funds were never delivered to Valentine, but were simply shifted by ledger entry into the account Valentine had opened with Delaney's power of attorney. There is no evidence that Delaney intended to make a gift of these funds, nor did he have a habit of presenting Valentine with large or expensive gifts while he was alive. The trial court was correct in finding that both accounts were convenience accounts, rather than joint accounts with a right of survivorship, and that no *inter vivos* gift had been made as to either account.[15]

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[15] Neither appellant nor any other party has argued that the District of Columbia's Uniform Nonprobate Transfer on Death Act, D .C. Code § § 19-601 -603.11, adopted in 2001, applies to this case. Accordingly, we do not consider whether that statute might apply to the 1999 judgment at issue here, or, if it should apply, what its application would be.

E. Constitutional Due Process Rights and "Freedom of Contract Rights"

The last of Valentine's many claims in this set of appeals is that the trial court violated her Constitutional due process and "freedom of contract" rights when it required her to deposit the disputed funds into the court registry. With respect to due process, Valentine's claim is that she received inadequate notice of the hearing and that the hearing itself was also inadequate.

(1) Due Process

The requirement of procedural due process prevents the government from arbitrarily depriving persons of their property. Due process contemplates a fair process or procedure which requires at least an opportunity to present objections to the proposed action to a fair, neutral decision-maker when the government undertakes to deprive an individual of property.

The order to deposit the funds in question into the court registry was issued orally at a hearing held January 23, 1997, and in written form on January 27, 1997. The court had scheduled the hearing to consider the estate's motion for summary judgment. The trial court recognized that the estate's motion for summary judgment presented several separate but related requests for relief, including a motion for summary judgment on the issue of whether the accounts were part of the estate, a motion for an accounting of the funds, and an embedded motion to bring the funds into the court's "domain" pending resolution of the underlying dispute. This was a reasonable interpretation of the motion and its accompanying proposed order (which required deposit of disputed funds into escrow account).

At the hearing, Valentine' s then attorney stated that he was not fully prepared to argue the merits of the motion for summary judgment and had not filed an opposition because he had been awaiting a ruling on his objection to the timeliness of the motion. However, Valentine and her attorney had clearly

received notice that the court planned to hold a hearing that day, and both she and her attorney were present. As we note above, Valentine's attorney's reading of the scheduling order was not implausible. Counsel, however, neither sought a continuance nor asked leave to file an opposition after the hearing. At the hearing, counsel argued on the merits against the granting of summary judgment on the estate's claim that it was entitled to have Valentine return to it the proceeds of Delaney's two Virginia accounts, and prevailed on that point. The court, however, granted the estate's motion as it pertained to an accounting and the placing of the proceeds of the accounts in escrow. Valentine did not seek reconsideration. Under these circumstances, we cannot hold that the results of the hearing were affected by Valentine's claimed lack of notice.

Nor can we agree that Valentine's due process rights were denied her by the nature of the hearing. Under Super. Ct. Civ. R. 12-1 (f), the court, within its discretion, may decide whether or not to hold a hearing on a motion. *See Headspeth* v. *Mercedes-Benz Credit Corp.*, 709 A.2d717,721 n.6(D.C. 1998) (citing *Pagan v.Horton,* 464 A.2d 146,148 (D.C. 1983)). Although counsel for Valentine stated that he had believed the motion for summary judgment would not be considered until a later date, he did in fact argue the matter, with some success. He did not seek a continuance, leave to file additional materials, or reconsideration. Thus, he did not utilize all the procedures available to him. Considering all that transpired, we are satisfied that Valentine received notice and a hearing sufficient to satisfy Constitutional due process requirements.

(2) Freedom of Contract

Appellant Valentine also claims her Constitutional rights under the "Freedom of Contract Clause" of the Constitution were denied to her by the trial court. Assuming she is referring to the Contract Clause of the Constitution (U.S. CONST, art. I, §10, cl. 1), Valentine is incorrect in her assertion. The Contract Clause applies not to court decisions, but only to state legislation that retroactively impairs contract rights. *Tidal Oil v. Flanagan,* 263 U.S. 444(1924).

The trial court's March 23, 1999 findings of fact and

conclusions of law and October 20, 1999 judgment and judgment order are affirmed in all respects.

SECTION III: Appeal Nos. 00-PR-71; OO-PR-768 & OO-PR-808 1. Appeal-Specific Facts and Procedure

This group of three appeals is made up of appeals from two orders. The first order denied compensation sought by Elliott (the original personal representative of the estate). The second order disallowed in part the attorneys' fees sought by R. Eliot Rosen, Esq., tax advisor to the estate. The order as to Elliott was appealed by Elliott (No. 00-PR-71). The order as to Rosen was appealed by Rosen (OO-PR-808) and by Valentine (OO-PR-768), whoasserted that Rosen is entitled to no fees. As to the appeals from both orders, the appellees are the residuary beneficiaries including, *inter alia,* the NAACP and the American Heart Association.

A. **Elliott**

The July 31 will contains the following clause:

> Item XV: My Executor is entitled to receive compensation for daily expenses from time to time and any unusual costs deemed reasonable by the court. I ask that he serve for no Executor fee from anyone.

On April 26, 1994, Elliott filed a request for compensation as Executor. The court (J. Long) denied this request on two bases on August 16, 1994 (the "1994 order"). First, the court noted that Elliott's request did not comport with Superior Court Probate Rule 124.[16] Second, and more important, the court noted that Elliott was seeking payment for personal time rather than "daily expenses" or "unusual costs," and that under Item XV of the will, Elliott was entitled to none of the customary

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[16] Super. Ct. Prob. R. 124 sets forth in detail the requirements of form and substance that a request for compensation must meet.

fees paid for the services of personal representatives. The court then denied Elliott's request and ordered that he not file "any such further petitions." Elliott did not appeal this order. Appellees assert that instead of appealing he received an advance from the $365,000 cash bequest to him set forth in Item V of the will.

Elliott made a second request for compensation on October 12, 1999, to which he filed an addendum on November 14, 1999. In his 1999 request, Elliott acknowledged that the 1994 order controlled, but asserted that the 1999 claim was different because he was seeking reimbursement for litigation expenses as "unusual costs." Specifically, Elliott was seeking expenses for work as a paralegal for the estate's tax attorney, Rosen. After a hearing on December 10, 1999, the trial court (J. Christian) issued an order denying Elliott's second request for compensation (the "1999 order"). In so doing, the court first noted that Elliott had requested compensation for personal expenses, not unusual costs or expenses, and that Elliott could not seek payment for personal expenses under the will. The court then took note of the 1994 order and stated that it found the language of that order "controlling" as to its interpretation of Item XV of the will. The appeal before us now is from the 1999 order.

B. Rosen

During the course of the probate of the July 31 will, Elliott hired Rosen as tax counsel for the estate. On October 7, 1999, as *Elliott v. Valentine* was coming to a close, Rosen submitted a request for compensation in the amount of $74,125.00. After a hearing on December 10, 1999, the trial court issued an order on May 15, 2000, disallowing some of Rosen's line-item compensation requests and reducing others. The result was an award of $38,815.43, of which $750.00 had already been paid.

2. Discussion

A. Discussion as to Elliott

(1) Standard of Review

The governing statute is D.C. Code § 20-751 (1981) which was in effect when Delaney died, when the will was admitted to probate and when Judge Long issued her 1994 order.[17] The 1993 version of § 20-751 (a) reads: "Reasonable compensation for work performed by a personal representative . . . with respect to administration of the estate pursuant to this title *may* be paid upon approval by the Court...." D.C. Code § 20-751 (a) (1981) (emphasis added). Since the probate court had complete discretion as to whether or not to approve requests for compensation payments from personal representatives, we review for abuse of discretion. *See generally Johnson* v. *United States,* 398 A.2d354 (D.C. 1979).

(2) Level of Discretion Available to the Trial Court

The law of the case doctrine "bars a trial court from reconsidering the same question of law that was submitted to and adjudicated by another court of coordinate jurisdiction." *Weinberg* v. *Johnson,* 518 A.2d 985, 987 (D.C. 1986). This doctrine applies if the first ruling is "sufficiently final" and is not "clearly erroneous in light of newly presented facts or a change in substantive law." *Williams v. Board of Trustees of Mount Jezreel Baptist Church,* 589 A.2d 901, 907 (D.C.) (internal quotations and citation omitted), *cert, denied,* 502 U.S. 865(1991).

(i) **Finality**

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[17] The 1993 version of § 20-751 was enacted June 24, 1980 and remained in effect until enactment of the current version of the probate statute. *See* Legislative History notes after D.C. Code §§20-101,-751 (1993). Although the current version of § 20-751 became law well before appellant Elliott filed his second request for compensation, it was part of the Probate Reform Act of 1994 which applied only to estates of decedents dying after July 1, 1995. *See In re Estate of King,* 769 A.2d 771, 777 n.7 (D.C. 2001). See also Probate Reform Act of 1994 Emergency Amendment Act of 1995, D.C. Act 11-79, 42 D.C. Reg. 3452(1995). Delaney died on August 6, 1993.

When the 1994 order was entered, there was no probate rule defining the types of orders that were final and appealable.[18] Instead, finality of orders in probate proceedings was governed by the general principles used in other civil proceedings. *Murphy* v. *McCloud,* 650 A.2d 202,203 (D.C. 1994) (citing D.C. Code § 11-721 (1989)). In *Murphy,* we held that a probate order would be final if it conclusively disposed of or decided the issue or controversy for which that particular part of the proceeding was brought. This would be so even if the decision did not fully and finally dispose of the entire probate proceeding. "In other words, a probate order is appealable if it finally adjudicates a substantial right; on the other hand, if it merely leads to further hearings on the issue, it is interlocutory." *Vineyard v. Irvin,* 855 S.W.2d 208,210 (Tex. App. 1993) (cited with approval in *Murphy, supra,* 650 A.2d at 203). The 1994 order met this standard of finality. The issue of the personal representative's compensation under the will is separate from administration of the estate, and was conclusively disposed of by the 1994 order. Elliott could have appealed, but did not. Thus, we must consider whether Elliott has made the requisite showing of clear error.

(ii) "Clearly Erroneous"

The 1994 order was not clearly erroneous when entered, as it was based on an entirely reasonable interpretation and application of Item XV of Delaney's July 31 will. Appellant Elliott presented no additional facts that might establish that the court's 1994 interpretation of the will was clearly erroneous, nor did he bring to light a change in substantive law that rendered the 1994 order clearly erroneous. Since the 1994 order was sufficiently final and not clearly erroneous, it was binding on the trial court in 1999 under the law of the case doctrine.

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[18] Super. Ct. Prob. R. 8 (c)(2) now expressly provides that a determination of the rights of interested persons through construction of a will is a final order, but was not effective until February 1, 1997.

Therefore, in 1999, the trial court had no discretion to award expenses for personal services to Elliott. The only discretion left to the trial court in this area was in determining whether the additional expenses for which Elliott was requesting compensation were for personal services or for "daily expenses" or "unusual costs," since the latter were allowed under the will's Item XV.

(3) Trial Court's Exercise of Its Limited Discretion

When Elliott filed his second request for compensation, he was seeking an award for the litigation support services he personally performed for the attorneys hired by the estate. Elliott implicitly acknowledged the trial court's limited discretion in his second request by requesting compensation for services which he couched as "unusual costs," rather than as personal services, on the ground that Delaney could not have anticipated that Elliott would find himself embroiled in the extensive litigation of *Elliott* v. *Valentine* and *Patton v. Elliott.* Throughout his request, however, Elliott consistently referred to the paralegal work he did under the direction of the estate attorneys as "services." (Elliott never claimed that his paralegal services constituted "daily expenses," which may be compensated under the will.) Furthermore, there was nothing in the second request or its addendum that clearly delineated what was unusual about the costs Elliott had listed.

We find no abuse of the trial court's limited discretion in its ruling that the costs sought in the second request were for Elliott's "personal services," and that therefore the request was barred under both the July 31 will and the 1994 order. The trial court's order of December 13, 1999, denying appellant Elliott's request for compensation is affirmed.

B. Discussion as to Rosen's Appeal of Compensation Order

(1) Standard of Review

We review the trial court's award of attorneys' fees for abuse of discretion. *In re Estate of King, supra,* 769 A.2d at 780. The

trial court is to consider specific statutory factors in arriving at its decision, but "failure to make appropriate findings of fact is itself an abuse of discretion." *Id.* at 777.

(2) Court's Denial of Some of the Compensation Requested

Appellant Rosen's compensation request was governed by § 20-751 of the 1993 version of the D.C. Code. The request was to include documentation which showed: (1) a reasonable relationship between the fees being requested and the nature of the services performed; (2) the reasonableness of the time spent; (3) the number of hours expended; (4) the applicant's usual hourly compensation; and (5) the results actually achieved.[19]

In its May 15, 2000 order, the trial court addressed each of the relevant factors in reaching its decision. It also made findings and explained how it arrived at each of the reductions it ordered. The court went on to state the precise number of hours that should be compensated for various types of work, and the hourly rate at which those hours should be compensated. *See Williams* v. *Ray,* 563 A.2d 1077 (D.C. 1989) (reversing trial court for failure to specify number of hours that should be compensated and at what rate). Certain entries were rejected because they were not adequately documented, and the court was careful to explain this as well. Similarly, the court explained the ten percent reduction that it applied to Rosen's gross award.[20] Since the trial judge considered the proper statutory factors; made findings as to those factors, *see Lemp* v. *Keto,* 678 A.2d 1010, 1021 (D.C. 1996), and clearly articulated what hours should be compensated, why some time charged was disallowed, and the appropriate hourly rate for the time allowed, there was no abuse of discretion.

(3) **Due Process**

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[19] These factors are now listed under § 20-753, but they remain the same as those in force in 1993 when Delaney died and in 1994 when the Delaney estate entered probate. D.C. Code §20-753 (2001).

Rosen claims he was denied due process because the judge did not hold an evidentiary hearing on the validity of the line items in his compensation request. As discussed in connection with for appeals 99-PR-531 and 99-PR-1392 above, the requirements of due process are flexible and depend on the private and governmental interests implicated by a particular case. *See Mathews* v. *Eldridge,* 424 U.S. 319, 334 (1976). Superior Court Civil Rule 12-1 (f), applicable to probate proceedings pursuant to Superior Court Probate Rule 1 (f), provides that whether or not to hold an oral hearing on a motion is within the discretion of the assigned judge.

In this case, Rosen was afforded notice and a hearing before the judge ruled on his compensation request. He filed a detailed request for compensation, was represented by counsel at the hearing, and had an opportunity to respond to objections raised by other parties. Rosen never requested a hearing specifically to adduce evidence on each line item listed in his request for compensation and cites no cases in support of his assertion that he was entitled to present evidence.

Rosen has failed to establish that an evidentiary hearing would have added anything to the information available to the trial court when it made its ruling on his compensation request. Presumably, Rosen gave the court all the information he thought would support his position when he filed his initial request, and thus an evidentiary hearing would have added nothing to the data available in a way that would have reduced the risk of an erroneous deprivation. Rosen received all the process due to him.

Since Rosen received due process, and since the trial court did not abuse its discretion in determining Rosen's compensation, the trial court's May 15, 2000 order as to Rosen's compensation is affirmed.

C. Discussion of Valentine's Appeal of the Rosen Compensation Order

The trial court's findings of fact, conclusions of law and order of March 23, 1999, stated that Valentine "has forfeited her

bequest under the [July 31] will."[21] The trial court so ordered because appellant Valentine's attempted contest of the July 31 will in *Elliott v. Valentine* stripped her of her status as legatee by operation of the no-contest clause in the July 31 will.[22] Since she is no longer a legatee, appellant Valentine is no longer an interested person under the probate code,[23] and therefore cannot possibly be aggrieved by any decision of the trial court that does not relate directly to her. Only a party aggrieved by an order or judgment may appeal as of right to this court. D.C. Code § 11-721 (b) (2001). Valentine has no standing to appeal any of the trial court's decisions made after October 20, 1999, which do not concern her directly. Therefore, we need not consider the merits of her appeal from the May 15, 2000, order on the issue of appellant Rosen's compensation.

SECTION IV: APPEAL NOS. 00-PR-873; 00-PR-904 & 00-PR-905

These three appeals are taken from a June 6, 2000, order requiring Valentine to pay attorneys' fees to the Delaney estate and the charitable beneficiaries. The Delaney estate appealed from the order to the extent that it was denied attorneys' fees that it sought (No. 00-PR-873). Christopher Hoge, Esq., successor personal representative, is the appellant on behalf of the estate in Appeal No. 00-PR-873, and Valentine is the appellee. Valentine cross-appealed the June 6, 2000, order to the extent that it required her to pay fees to the estate and the

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[21] This order was finalized in the trial court's judgment order of October 20, 1999.

[22] Item XVI of the July 31 will reads: "If any beneficiary or my Executor challenges my bequests, any amount due them will be cancelled and revert back to my estate, to be
distributed to the above named charities."

[23] The probate code defines an interested person as "any legatee in being, whether such legatee's interest is vested or contingent, until the legacy is paid in full." D.C. Code § 20-101 (d)(l)(C) (2001).

charitable beneficiaries (Nos. 00-PR-904 and 00-PR-905). She abandoned theese cross-appeals, and they are hereby dismissed. D.C. App. R. 14. This leaves only the estate's appeal from the June 6, 2000, order denying, in part, its request for attorneys' fees.

1. Appeal-Specific Facts and Procedure

During the course of the *Elliott v. Valentine* and *Patton* v. *Elliott* subsidiary proceedings, Valentine made two attempts to challenge the July 31 will (one of which came after the March 31, 1997, order denying her caveat as time-barred), made an extremely belated attempt to assert common law wife status, attempted to intervene in *Patton v. Elliott,* and was accused by the personal representative (Elliott) and the residuary beneficiaries of interfering with a trial witness. She also filed multitudes of motions, many of which had scant legal basis, and at least four premature appeals The facts surrounding the challenges to the July 31 will and the assertion of common law wife status are fully discussed above.

Valentine also was the subject of a contempt hearing because she failed to comply with an order requiring her to pay the fees of the court-appointed auditor. The court held another contempt hearing as to one of the trial witnesses because the witness violated a court order prohibiting her from discussing her trial testimony with anyone other than her legal counsel. The witness and Valentine were friends and lived in the same town. Valentine drove the witness to and from the hearings. During those car trips, the witness discussed her testimony with Valentine in violation of the trial court's admonition to discuss her testimony with no one but her lawyer. The witness also changed her testimony after discussing her previous day's testimony with Valentine while riding with Valentine to and from the court. As a result of these activities, the trial court held a hearing with regard to whether to hold the witness in contempt. In a March 23, 1999, order discharging the show cause order as to this witness, the trial court noted both that the witness was forthright in admitting that she had discussed her testimony with others, and that she might have been manipulated by individuals involved in the litigation.

The estate and the charitable beneficiaries, by separate motions, sought more than $450,000 as their costs in responding to Valentine's method of litigation. In their motion, the estate and charitable beneficiaries asserted that many of Valentine's litigation maneuvers were either unreasonable or were made in bad faith, and that both contempt hearings resulted from Valentine's unreasonable conduct. The trial court responded to this motion with a June 6, 2000, order requiring Valentine to pay a total of $6,138 to the Delaney estate and the charitable beneficiaries for attorneys' fees incurred as a result of the contempt hearing on her failure to pay the auditor. On appeal, the estate and charitable beneficiaries assert that the trial court erred in declining to award attorneys' fees (1) incurred in opposing claims that were foreclosed by court order, (2) incurred in opposing claims that Valentine advanced without a good faith basis in law and in fact, and (3) arising from the interference with a trial witness.

2. Discussion

A. Standard of Review

Where a trial court has refused to impose sanctions, the standard of review is whether the trial court abused its discretion. *Kennedy v. District of Columbia,* 654 A.2d 847 (D.C. 1994). When the party seeking sanctions has alleged bad faith as a basis for seeking those sanctions, "the predicate finding of bad faith *velnon* is a factual one which we review under the clearly erroneous standard." *Schlank v. Williams,* 572 A.2d 101,111 (D.C. 1990) *{inter alia* citing D.C. Code § 17-305 (a) (1989)). *See also Synanon Found., Inc.* v. *Bernstein,* 517 A.2d 28, 38 (D.C. 1986); and *Trilon Plaza Co. v. Allstate Leasing Corp.,* 399 A.2d 34, 40 (D.C. 1979). Therefore, we review the trial court's order of June 6, 2000, under a combination of the abuse of discretion and clearly erroneous standards.

B. Discussion

Under Super. Ct. Civ. R. 11 (c), a court may impose sanctions on attorneys responsible for violations of section (b) of the Rule. Super. Ct. Civ. R. 11 (b) states, in part, that by presenting a pleading to the court, the presenter is certifying "that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances ... the claims, defenses and other legal contentions [in the pleading] are warranted . . ." and that "the allegations and other factual contentions have evidentiary support or... are likely to have evidentiary support after reasonable opportunity for further investigation or discovery." A trial court also has an inherent sanctioning power that transcends specific statutes or rules and extends to the full range of litigation abuses. *Chambers* v. *NASCO,* 501 U.S. 32, 46 (1991). Thus, while a court's rules may reach only specified conduct, the court's inherent power fills the gaps. *Id.* Just as Rule 11 gives the court discretion in imposing sanctions, Super. Ct. Civ. R. 11 (c), courts are to exercise their inherent powers to sanction by awarding attorneys' fees with "restraint and discretion." *Roadway Express, Inc.* v. *Piper,* 447 U.S. 752, 764 (1980).

A court may award attorneys' fees against a party who has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons" in connection with the litigation. *Roadway Express, supra,* 447 U.S. at 766 (internal citation omitted). *See also Synanon, supra,* 517 A.2d at 28. This "bad faith exception is intended to punish those who have abused the judicial process and to deter those who would do so in the future." *Synanon, supra,* 517 A.2d at 37. *See also Kasachkoff v. Ross H. Finn, Co.,* 408 A.2d 993 (D.C. 1979) (per curiam). Courts also may award attorneys' fees against a party who exhibits a "willful disobedience of a court order." *Chambers, supra,* 501 U.S. at 45 (internal quotation and citation omitted). *See also Roadway Express, supra,* 447 U.S. at 752; *Synanon, supra,* 517 A.2d at 36.

In awarding attorneys' fees, however, "a party is not to be penalized for maintaining an aggressive litigation posture, nor are good faith assertions of colorable claims or defenses to be discouraged." *Lipsig v. National Student Mktg. Corp.,* 214

U.S. App. D.C. 1,4,663 F.2d 178, 180-181 (1980). "In attempting to deter bad faith litigation through attorney fee awards, the court must scrupulously avoid penalizing a party for a legitimate exercise of the right of access to the courts." *Synanon, supra,* 517 A.2d at 37. For this reason, "[t]he standards of bad faith are necessarily stringent." *Adams v. Carlson,* 521 F.2d 168, 170 (7th Cir. 1975).[24] Under these stringent standards, the awarding of attorneys' fees for bad faith litigation is proper only under "extraordinary circumstances or when dominating reasons of fairness so demand." *Synanon, supra,* 517 A.2d at 37 (citing *Launay v. Launay, Inc.*, 497 A.2d 443 (D.C. 1985)); *Andrews v. District of Columbia,* 443 A.2d 566 (D.C. 1982); *Kasachkoff, supra,* 408 A.2d at 993.

(1) Costs Associated with Appellee Valentine's Attempted Challenges to the Will

The estate asserts that Valentine acted in bad faith by violating two orders barring a will contest. First, the estate maintains that the April 4, 1994, order admitting the July 31 will to probate acted as a bar to Valentine's attempted caveat in March of 1997 because by the time Valentine brought this challenge, the six-month statutory time period for bringing a caveat had expired. Second, the estate points to Valentine's pleading filed in early April 1997, which also challenged the July 31 will, and maintains that this filing was also in bad faith since it had been barred by the trial court's order of March 31, 1997, dismissing Valentine's challenges to the will as time-barred. Finally, the estate asserts that Valentine's attempt to

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[24] This stringency is consistent with the American Rule regarding attorneys' fees which requires each party to bear its own attorneys' fees. The American Rule serves to ensure that no individual will be deterred from bringing legal action for fear of losing and being forced to pay substantial legal fees for the other side. Rule 11 sanctions and a trial court's inherent sanctioning powers form a narrow exception to the American Rule.

intervene in *Patton* v. *Elliott* was a violation of the order admitting the will to probate, and the March 31, 1997 and June 27, 1997 orders dismissing Valentine's various challenges to the will.

Even if Valentine's first challenge to the will could be construed as a violation of the order admitting the will to probate, it is not at all clear that any of Valentine's attempted challenges to the will were "entirely without color and... asserted wantonly, for purposes of harassment or delay, or for other improper reasons." *Browning Debenture Holders' Comm. v. DASA Corp.*, 560 F.2d 1078, 1088 (2d Cir. 1977). This is because a claim is colorable for purposes of a bad faith analysis when it has *"some* legal and factual support." *Nemeroff v. Abelson,* 620 F.2d 339, 348 (2d Cir. 1980) (per curiam) (emphasis added). "The question is whether a reasonable attorney could have concluded that facts supporting the claim might be established, not whether such facts actually had been established." *Id.* Sanctions should not be imposed unless it is "patently clear that a claim ha[d] absolutely no chance of success" prior to filing. *Schwartz* v. *Franklin Nat 'IBank,* 718 A.2d 553,555 (D.C. 1998) (citation omitted); *Green v. Louis Fireison & Assocs.*, 618 A.2d 185, 188-189 (D.C. 1992).

As shaky as they were, none of Valentine's challenges to the will sank to such a level as to compel a finding of bad faith and require a court to either award sanctions or risk abusing its discretion. Valentine's initial pleadings were based on some facts that tended to support her claim of a forged will. Her pleadings after the March 31,1997, order argued for either application of the discovery rule to probate statutory time limitations or use of the fraud statute of limitations in this probate proceeding. Thus she either had some factual support for her pleadings or was arguing for a modification of existing law. The trial court did not commit error when it did not find bad faith on Valentine's part and did not abuse its discretion in refusing to award attorneys' fees for the various challenges to the will.

2) <u>Costs Associated with Valentine's Common Law Wife Claim</u>

The estate also claims the court should have awarded sanctions because Valentine did not have a good faith basis in bringing her common law spouse claim. According to the estate, Valentine lacked this basis because she could not establish the facts necessary to prove her claim. The claim was advanced by Valentine's recently retained replacement attorney who did not have a transcript of the much earlier deposition of Valentine in which she gave testimony that undercut her common law spouse claim. Predecessor counsel had not had the deposition transcribed. Replacement counsel relied on information given him by Valentine in constructing the common law spouse claim. It is not sanctionable behavior for an attorney to file a complaint based solely on the oral representation of his client without the benefit of independent corroboration. *Gray v. Washington*, 612 A.2d 839 (D.C. 1992). We are not persuaded that the trial court committed clear error when it did not find bad faith on Valentine's part and conclude that it did not abuse its discretion by refusing to sanction Valentine for bringing this particular claim.

(3) Costs Associated with Valentine's Interference with a Witness

Lastly, the estate asserts that Valentine should have been assessed attorneys' fees because her interference with a witness resulted in a contempt hearing against the witness which in turn caused unnecessary delay and expense. While it is true that Valentine may have attempted to interfere with the witness by discussing the witness' testimony with her, it is also true that the trial court's prohibition on such discussions was directed at each individual witness, not at the parties to the proceedings.

The witness in question was the CEO of a small credit union and a responsible adult who was capable of obeying the court's order not to discuss her testimony with anyone. We cannot conclude that it was unreasonable for the trial court to hold this witness fully responsible for the contempt hearing that resulted from her violation of the

court's prohibition on discussing her testimony with others. Since the trial court did not act unreasonably in so holding, it did not abuse its discretion by declining to require Valentine to pay attorneys' fees for the witness' contempt hearing.

SECTION V: APPEAL No. 01-PR-1469

The last of the appeals before us was noted from the order removing Elliott as personal representative of the estate. Elliott is the appellant and Christopher Hoge, Esq., successor personal representative, is the appellee on behalf of the estate.

1. Appeal-Specific Facts and Procedure

In July of 1994, Elliott was appointed personal representative of the Delaney estate in accordance with Item XIII of the July 31 will which reads:

> I hereby nominate, constitute and appoint Lawrence Elliott as Executor and trustee of my Will and ask that he be allowed to serve with no bond. If Lawrence cannot serve for any reason, I nominate Celestine, his wife, to be Executrix with nominal bond.

While serving as personal representative, Elliott failed to locate all of decedent's relatives and provide them with the required notice of his appointment. He also failed to file the estate's District of Columbia fiduciary tax returns for the years 1993-1997 in a timely manner, as a result of which the estate had to pay penalties and interest charges on amounts owing for each of those tax years.[25] Elliott offered two explanations for the late filing of the 1993 return. First, he stated that he purposely did not file the 1993 return on time because it was anticipated that litigation expenses incurred in subsequent years could be

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[25] All these returns were eventually filed, and the corresponding taxes were paid, in 1999.

allocated to earlier years thereby lowering or eliminating the amount of tax due for 1993. Then, when that proved to be legally impossible, Elliott maintained that he delayed payment so he could use the 1993 tax payment to reduce the federal fiduciary income tax due in 1999. All of this information came to light in 2000 after Elliott filed an Amended Eighth, Ninth and Tenth Accounts for the estate.

The charitable beneficiaries objected to the Eighth and Ninth accounts on the grounds that the late-filed income tax returns had resulted in avoidable penalty and interest charges to the estate. After Elliott responded to those objections, the trial court issued an order on March 8, 2001, declining to approve the account and noting several concerns with the strategy as to the 1993 taxes. The trial court then ordered Elliott to file detailed documentation addressing the court's concerns.

By July of 2001, Elliott still had not complied with the trial court's requirement of additional documentation. On July 6, 2001, the Register of Wills sent Elliott notice of a summary hearing, scheduled for August 15, 2001, on the question of Elliott's removal for delinquency. Successive hearing dates of October 3 and October 10, 2001, were thereafter noticed and postponed. On October 10, 2001, over the objection of the charitable beneficiaries, the removal hearing was postponed again and rescheduled for November 14, 2001. Notice for all these hearing dates was provided to Elliott. On November 5, 2001, Elliott finally responded to the trial court's March 8, 2001, order to provide further documentation on the 1993 taxes.

The removal hearing was held on November 14, 2001. Later that same day, the trial court issued an order removing Elliott as the personal representative for the Delaney estate. Elliott noted his appeal on November 27, 2001. Two days later, the charitable beneficiaries moved to amend the order to include an explanation of why the trial court did not appoint Elliott's wife as successor personal representative. The next day, November 30, the court issued its amended order.

In his appeal, Elliott asserts that (1) his removal was improperly based solely on failure to perform his duties,

(2) he was denied due process in being removed, and (3) the trial court erred by not appointing Elliott's wife as successor personal representative.

2. Discussion

A.. Jurisdiction and Standard of Review

(1) Jurisdiction

Appellee Hoge contends that since appellant Elliott appealed from the November 14, 2001, order rather than the November 30, 2001 amended order, he did not appeal a "final order" and therefore this court does not have jurisdiction to hear the appeal. *See* D.C. Code § 11-721 (a)(l). Hoge posits that a ruling on a pending motion by a trial court cures prematurity only where the court "later ruled upon the pending motion without modifying the judgment being appealed." *Circle Liquors, Inc.* v. *Cohen,* 670 A.2d 381, 385 n.8 (D.C. 1996). *See also* D.C. App. R. 4 (a)(2) ("The running of time for filing a notice of appeal is terminated as to all parties by the timely filing of [a motion] ... to amend the order.") Hoge contends *Circle Liquors* means that this court does not have jurisdiction to hear Elliott's appeal because the trial court modified the order from which Elliott appealed.

In *Circle Liquors,* the motion in question was a "Motion to Amend Judgment." *Id.* The timely filing of such a motion renders the judgment in the case non-final and that, in turn, denies this court jurisdiction to hear any appeal from that particular judgment. *Dyer, supra,* 635 A.2d at 1288. However, when a requested amendment "raises issues that are, for all practical purposes, 'collateral to and separate from the decision on the merits," the order disposing of the merits remains appealable. *Weaver* v. *Grafio,* 595 A.2d 983, 986 (D.C. 1991) (citing *Budinich* v. *Becton Dickinson & Co.,* 486 U.S. 196, 200 (1988)). *See Words, Inc.* v. *Singer,* 810 A.2d 910 (D.C. 2002). Moreover, if the trial court later rules on "the pending motion without modifying the judgment being appealed," *Circle Liquors, supra,* 670 A.2d at 385 n.8, the premature filing of the

appeal does not divest this court of jurisdiction.

The charitable beneficiaries' motion to amend the order requested only the addition of explanatory material. It did not ask the trial court to modify either the portion of the judgment removing Elliott, or the portion of the judgment appointing Hoge. The motion merely sought an explanation as to why there was good cause for removing Elliott and for not appointing his wife as his successor. Therefore, the order Elliott appealed from was immediately appealable and remained so. *See, e.g., Budinich, supra,* 486 U.S. at 196 (holding that a judgment disposing of the merits but leaving open the question of attorneys' fees is a final, appealable order); *Weaver, supra,* 595 A.2d at 983 (holding that judgment disposing of all issues except Rule 11 sanctions should be treated as immediately appealable). Since that is so, Elliott's appeal was not premature, and this court has jurisdiction.

(2) Standard of Review

In an appeal arising from a matter tried without jury, "we must decide independently whether the trial judge committed 'errors of law,'" *Hopkins* v. *Akins,* 637 A.2d424,426-27 (D.C. 1993), or "the judgment was plainly wrong or without evidence to support it." D.C. Code§ 17-305(1989).

(i) Removal of a Personal Representative

Under D.C. Code § 20-526 (b), the trial court must remove the personal representative if it finds, after a hearing, that he or she has committed one of several infractions enumerated therein. We may not set aside a judgment of a trial court in a matter tried without jury except for errors of law unless it appears that the judgment is plainly wrong or without evidence to support it. D.C. Code § 17-305. *See Conner v. 1747 Pa. Ave. Assocs., L.P.,* 669 A.2d 693 (D.C. 1995); *Walker* v. *District of Columbia,* 656 A.2d 722 (D.C. 1995). Since the court has no discretion, but is statutorily bound to remove the personal representative if it finds that he or she has committed an infraction of a personal representative's fiduciary duties, we

review only the finding of an infraction.

(ii) Appointment of a Personal Representative

By contrast, review of a trial court's appointment power should be conducted under an "abuse of discretion" standard since the Code allows the trial court to vary from the statutorily prescribed order of preference in appointing a successor personal representative. D.C. Code § 20-303 (d) (2001) (the court "may, for good cause shown, vary from the order of priority"). The decision on whom to appoint is therefore "committed to the discretion of the trial court and is reviewable by this court only for an abuse in its exercise." *Johnson* v. *United States,* 398 A.2d 354, 367 (D.C. 1979).

B. Issues on Appeal

(1) Elliott's Removal

D.C. Code § 20-526 states that "a personal representative shall be removed from office upon a finding by the Court that such representative: ... (5) has failed, without reasonable excuse, to perform any material duty of such office." D.C. Code § 20-526 (a)(5) (2001). In its summary hearing order of November 14, 2001, the trial court found that appellant Elliott had not filed proper accounts and that he had not fulfilled his duties and responsibilities as the personal representative for the estate.

The record shows that Elliott had failed to perform his fiduciary duties in that he was extremely late in paying the taxes for the estate and his tardiness cost the estate substantial IRS penalties. At the hearing, the trial court noted that paying the taxes on time was an elementary fiduciary duty. Although, as explained above, Elliott attempted to defend his tardiness, the trial court found his excuse for the delay questionable at best. The trial court also noted that in managing the estate, Elliott had the assistance of both legal counsel and a tax expert which made his tardiness even less reasonable. We are satisfied that the trial court committed no error. There was a sufficient factual basis for the trial court's underlying factual determination that

appellant Elliott had failed to perform a material duty of his office and that appellant Elliott had no reasonable excuse for that failure.

(2) Due Process in the Removal Process

Elliott claims he was denied notice and a hearing as required by due process, but the record demonstrates otherwise. He was notified, as required under Super. Ct. Prob. R. 121, that he faced removal if his failures to carry out his fiduciary duties were not corrected. He then requested and received at least one postponement of the summary hearing. Finally on the reset date of November 14, 2001, Elliott received a hearing on his removal. There was no violation of appellant Elliott's due process rights.

(3) Appointment of Successor Personal Representative

Hoge contends that once appellant Elliott was removed as personal representative, Elliott no longer had standing to contest the appointment of Hoge as successor personal representative. Under D.C. Code § 11-721 (b) (2001), only a party "aggrieved" may appeal from an order or judgment of a trial court. *See also* Super. Ct. Prob. R. 8 (a) ("[a]ny person who is aggrieved" by an order or judgment and who participated in the trial court's determination may take an appeal). A person is "aggrieved" when that person's legal rights have been infringed or denied. *In re CT.*, 724 A.2d 590, 595 (D.C. 1999). If a person has suffered no injury to his legal rights or to some legally protected relationship, he has no standing to appeal. *In re Estate of Jacobson*, 387 A.2d 590, 591 (D.C. 1978). Although he remains an interested party (because he is still a legatee), appellant Elliott sustained no injury to his legal rights or to any legally protected relationship from the appointment of appellant Hoge as successor personal representative. An appeal may be dismissed if the appellant lacks standing as an aggrieved party. *In re CT., supra,* 724 A.2d at 595. Since Elliott has no standing to appeal Hoge's appointment as successor personal representative, we dismiss Elliott's appeal of that portion of the

November 14, 2001 summary order.

Therefore, the trial court's summary hearing order of November 14, 2001 is affirmed.

SECTION VI: SUMMARY

As to the order dismissing Valentine's renewed claims of forgery in the July 31 will and her claim to be Delaney's common law wife, we hold (1) that a challenger may use the discovery rule to bring a belated will contest based on intrinsic fraud, but that Valentine's attack on the will coming, as it did, three years after the will was admitted to probate, reflected a lack of diligence on her part and came too late, and (2) Valentine's assertion of common law wife status was statutorily time-barred. Therefore, we affirm the trial court's order of June 27, 1997, dismissing both the challenge to the will and the common law wife claim as time-barred.

As to the trial court's March 23, 1999, findings of fact and conclusions of law and its October 20, 1999 order of judgment, both of which related to the ownership of the two Virginia accounts, we affirm in all respects. Because Valentine abandoned them, we dismiss Valentine's appeals from the court's orders (1) denying her motion to intervene in *Patton v. Elliott,* (2) requiring payment of auditor's fees, and (3) denying a request for a stay of enforcement.

We also affirm the trial court's compensation orders as to Elliott (issued December 10, 1999) and Rosen (issued May 15, 2000), and the trial court's order of June 6, 2000, requiring Valentine to pay attorneys' fees to the Delaney estate and the charitable beneficiaries. Finally, we affirm in all respects the trial court's order of November 30, 2001, removing Elliott as personal representative and appointing Hoge as the successor.

So ordered.

District of Columbia Court of Appeals

AUG 6 2003

Nos. 97-PR-1217, 98-PR-934, 98-PR-1104, 98-PR-1771, 99-PR-531, 99-PR-1392 &
99-PR-1619 IN RE: ESTATE OF DANIEL B. DELANEY
EDNA J. VALENTINE,
Appellant,

ADM 1809-93
v.
LAWRENCE M. ELLIOTT,
Appellee.
Nos. 00-PR-71, 00-PR-768 & 00-PR-808
IN RE: ESTATE OF DANIEL B. DELANEY
LAWRENCE M. ELLIOTT and R. ELIOT ROSEN,
Appellants,
v.
CHRISTOPHER G. HOGE,
Appellee.
Nos. 00-PR-873, 00-PR-904 & 00-PR-905 IN RE: ESTATE OF DANIEL B. DELANEY
CHRISTOPHER G. HOGE,
Appellant,

v.
EDNA J. VALENTINE,
Appellee.

No. 01-PR-1469
IN RE: ESTATE OF DANIEL B. DELANEY
LAWRENCE M. ELLIOTT,
Appellant,
v.

CHRISTOPHER G. HOGE,
Appellee.

BEFORE: Wagner, Chief Judge; Terry, Steadman, Schwelb, Farrell, Ruiz, Reid, Glickman, and Washington, Associate Judges.

ORDER

On consideration of appellants' petition for rehearing en banc; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA PROBATE DIVISION

In Re: Estate of
DANIEL B. DELANEY, deceased
Admin. No. 1809-93
Lawrence M. Elliott, Personal Representative,
Plaintiff

-v-

Edna J. Valentine,
Defendant

FILED
MAR 26 1999
3/26/99
DOCKETED

Findings of Facts, Conclusion of Law and Order

This matter came before the Court for an Accounting bench trial. The Court commenced trial on July 3, 1997, with the testimony of Charles Goldstein, court appointed auditor. The testimony of Mr. Goldstein could not be concluded on July 3. 1997 and was resumed on July 7, 1997. At the conclusion of Mr. Goldstein's testimony, the Defendant, Edna J. Valentine, through counsel, brought to the Court's attention individuals who were alleged to be heirs of the Estate of Daniel B. Delaney who had not been notified of the Probate Proceeding by the personal representative. Based upon those representations, the accounting trial was stayed to allow for the participation of the alleged heirs who thereafter filed a Complaint _ contesting the validity of the decedent's Last Will and Testament. Following the entry of Summary Judgment on September 3, 1998, dismissing the contest of the Last Will and Testament with prejudice, the accounting bench trial resumed on October 27, 1998, with the testimony of S. Henry Harris Agent for Merrill Lynch and the testimony of Peggy Custis, CEO, for Virginia State University Federal Credit Union. On October 28, 1998, the Court concluded the testimony of Peggy Custis and heard testimony from Stephanie Harris, tax preparer. The testimony of Stephanie Harris was concluded on October 29, 1998. On November 2, 1998, the Court heard the testimony of Lawrence Elliott, personal representative. On November 3, 1998, testimony was again provided by Peggy Custis, CEO, for

Virginia State Federal Credit Union and the Court heard testimony of Sally Johnston, friend of the decedent and defendant. The Court heard further testimony of S. Henry Harris, Agent for Merrill Lynch. The Court heard the testimony of the defendant, Edna J. Valentine on November 9, 1998, and was concluded on November 13. 1998. Upon consideration of the sworn testimony of the witnesses, the Court's assessment of each witness's credibility, the arguments of counsels, the review of the exhibits admitted into evidence, and a review of the applicable law, the Court makes the following:

Findings of Fact

Daniel B. Delaney, the decedent, died on August 6, 1993 at Washington Hospital Center at 6:40 a.m., in the District of Columbia following a bout with cancer. Prior to his death. Daniel B. Delaney was transferred from Providence Hospital to Washington Hospital Center on July 19, 1993 to undergo radiation and chemotherapy. Upon Mr. Delaney's admittance to Washington Hospital Center, a hospital physician observed that Mr. Delaney "has some degree of cognitive impairment; and memory becomes intermittently confused." On that same date, July 19, 1993, the decedent executed a power of attorney appointing the defendant, Edna J. Valentine, as his attorney in fact for "the general purposes of convenience in maintaining his real and personal property and to use such property for his support, maintenance, care and attention."[1]

Daniel B. Delaney was a resident and domiciliary of the District of Columbia who died testate with a Last Will and Testament dated July 31, 1993. The decedent's Last Will and Testament was admitted to Probate by Order of this Court dated April 4, 1994 and docketed April 5, 1994.[2] The decedent's Last Will and

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[1] As stated in the defendant's pre-trial statement.

[2] The Court notes that a document dated July 18, 1998, purporting to be the decedent's Last Will and Testament was admitted to Probate on September 7, 1993. That admission was vacated on April 4, 1994. The defendant contested the July 31, 1993, Last Will and Testament. The defendant's complaint was dismissed as time barred pursuant to the Court's Order of June 27, 1997, which included defendant's claim to be the decedent's common law spouse.

Testament nominated Lawrence Elliott as personal representative who was issued Letters of Administration on April 8, 1994. Mr. Elliott is Plaintiff in his fiduciary capacity in this matter.

Daniel B. Delaney was a schoolteacher by profession and believed that with limited spending and careful investment he could become a millionaire on a teacher's salary.

During his lifetime, the decedent was extremely thrifty, spending little on necessities and luxuries. His purchases were usually of second-hand or used items. The decedent was an avid saver and investor. He was a conservative investor. His financial objective was to accumulate assets.

During his lifetime, the decedent gave gifts of extremely small monetary value. For example, he gave the defendant's daughter a wedding gift of less than fifty dollars. The decedent would accompany the defendant to social events and on trips, but would routinely refuse to pay the expense.

6. The National Association for the Advancement of Colored People (NAACP), The American Heart Association (AHA), The American Cancer Society (ACS), The National Arthritis Foundation, Lawrence Elliott, Celestine Elliott. Edna J. Valentine, Stephanie Harris. Charles James, and Andre Michalak are beneficiaries under the decedent's Last Will and Testament.

6. Edna J. Valentine, a long time close and personal friend of the decedent, is the defendant in this action. The defendant. Edna Valentine, met the decedent in the 1930's. She was a high school student and he was a junior in college. They dated for a while. The defendant eventually married a classmate of the decedent in 1946. She remained married until the death of her husband in 1962. The defendant resumed her relationship with the decedent in 1965. The decedent and the defendant shared a personal relationship for many years and traveled together. The decedent had occasional over-night stays at the defendant's home. The relationship continued until 1982, when the relationship broke off. The defendant and decedent became close again and resumed their relationship in 1985.

On July 19, 1993, while at Providence Hospital, the decedent gave the defendant a financial Power of Attorney to provide her with access to the Merrill Lynch account in order to pay his bills and to generally act for his convenience. On
that same day, July 19, 1993, the Decedent was transferred to Washington Hospital Center where he remained until his death. Prior to the execution of the July 19, 1993 Power of Attorney, the decedent had attempted to execute a power of attorney that was not recognized by financial institutions with which he wished Ms. Valentine to deal.

On the date of his death. August 6, 1993, the decedent owned real property in the District of Columbia and was a note holder on property in Pennsylvania. The decedent owned a bank account with Virginia State University Federal Credit Union and he owned a brokerage account with Merrill Lynch.

As of August 6, 1993, the date of the decedent's death, the balance of the Merrill Lynch Brokerage Account no. 795-12D39 was $0.00. Assets from account no. 795-12D39 had been transferred to account no. 795-60Y12. which had a balance of $706,352.68 as of the date of the decedent's death.

10. As of August 6, 1993, the date of the decedent's death, the balance of the Virginia State University Federal Credit Union Account No. 3339 was $84,689.69.

11. The Merrill Lynch Brokerage Account was opened in the District of Columbia in 1962.The decedent held the Merrill Lynch Account as owner on the date of his death. All of the money used to fund the Merrill Lynch Account came from funds belonging to the decedent.

12. The Virginia State Federal Credit Union Account was opened on September 23, 1986, in Petersburg, Virginia. The decedent held the Credit Union account as owner on the date of his death. All of the money used to fund the Virginia State Federal Credit Union Account came from funds belonging to the decedent. As of the date of the decedent's death, August 6, 1993, the total assets of the Estate were approximately $1, 814,868.19, consisting of real property in the District of Columbia, a mortgage on property in Philadelphia, Pennsylvania, some personal property, various bank accounts, various government and municipal bonds, investment funds and insurance annuities, and the Merrill Lynch account no. 795-

60Y12 and the Virginia State University Federal Credit Union account no. 3339.

MERRILL LYNCH BROKERAGE ACCOUNT

The Merrill Lynch brokerage account was opened in the District of Columbia in 1962, at the Connecticut Avenue, NW, Washington, D.C. branch office of Merrill Lynch. The account constituted the bulk of the decedent's liquid assets.

The decedent's Merrill Lynch account was essentially a bond account. The address of record for the decedent's Merrill Lynch account, account no. 795-12D39, was 620 Nicholson Street, NW, Washington, DC, the decedent's home of many years. The decedent's security positions, or assets, were held in a "street name." Meaning that they were titled in the name of the brokerage firm and held as house stock, with the decedent's interest in the assets journalized to his account. The Merrill Lynch brokerage account was held solely in the decedent's name from the date it was established until four days before his death. Samuel Henry Harris was the decedent's financial consultant with Merrill Lynch. Mr. Harris assisted the decedent with his Merrill Lynch Account in 1962 and remained the decedent's financial consultant until his death in 1993. Mr. Harris worked at the Merrill Lynch Office located in the District of Columbia when he inherited the decedent's account from another financial consultant. Mr. Harris
remained in the District of Columbia until he was transferred to another office located in Tysons Corner, Virginia. Mr. Harris took the decedent's account file with him when he relocated and he continued to serve as the decedent's financial consultant. Over the course of his financial dealing with the decedent, Mr. Harris never met the decedent in person.

15. The Power of Attorney given by the decedent to the defendant on July 19, 1993 was not consistently honored by all financial institutions and the decedent was concerned that his financial affairs could go unattended. Thus, the defendant testified, the decedent was motivated to create a means by which the defendant would have access to his Merrill Lynch account in order to handle his financial affairs. In her deposition, the defendant stated that the Merrill Lynch account had to be changed because " I could not write any checks or do

anything that he [the defendant] was asking me." During his hospitalization, the decedent received checks, by mail, that were made payable to the decedent as sole payee. On July 27, 1993, the defendant took those checks to Merrill Lynch to be deposited in the decedent's account. The decedent ultimately changed his Merrill Lynch account to a joint account in his name and the name of the defendant so that she could pay bills.

16. On July 27, 1993, defendant Edna Valentine came to Mr. Harris's office seeking general information about the decedent's account. Over the twenty-nine year history of working with Mr. Delaney. Mr. Harris had never heard of the
defendant. Edna Valentine, until she came to his office seeking information about Mr. Delaney's account. Mr. Harris refused to provide or release information about Mr. Delaney's account to Ms. Valentine without Mr. Delaney granting him permission to do so. Mr. Harris would not recognize the July 19, 1993 Power of Attorney presented by Ms. Valentine.

17. In response to Mr. Harris's refusal to provide her information regarding the decedent's account, the defendant telephoned the decedent at the hospital and coordinated a telephone conversation between the decedent and Mr. Harris. Mr. Harris recalled that during that conversation, the decedent's voice was weak. Prior to that conversation, Mr. Harris was not aware of the decedent's illness. The decedent gave Mr. Harris permission to only discuss his affairs with the defendant. Mr. Delaney did not provide Mr. Harris with oral permission to transfer his account. Mr. Delaney made no oral request for a change in his account nor was there a request for an address change.

During the discussion with Ms.Valentine regarding the decedent's account, Mr. Harris explained asset transfer options, including transfer by Last Will and Testament, available to the decedent. Ms. Valentine requested that Mr. Harris explain any and all options *other than* by Last Will and Testament.

Based on the discussion with Ms. Valentine, Mr. Harris suggested that a joint account be set up.[3]

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[3] Mr. Harris stated in his Disposition Testimony on July 31, 1996 at p. 36 and 37, "when it become apparent that the only realistic way to change the ownership would be through a medium of a joint account and I know of

On that same date, July 27, 1993, Ms. Valentine filled out forms with Mr. Harris's assistance. The forms included: (a) an asset transfer form, authorizing the transfer of assets from the decedent's account number 795-12D39 to a " new account;" (b) a "new account" agreement; and (c) a check information form. The defendant, Edna Valentine, signed the "new account" agreement on July 27, 1993. as secondary account holder.

21. On that same date, the defendant took the forms back to the decedent's hospital room. The decedent refused to sign them because he was angry. The defendant returned to the decedent's hospital room the following morning of July 28, 1993, placed the papers before him and asked him to sign. After a two-hour period the decedent signed the documents. After obtaining the decedent's signature on July 28, 1993, the defendant had her daughter-in-law return the signed documents to Mr. Harris while she , the defendant, returned to her home in Petersburg, Virginia. The decedent signed the document unaided by his glasses.

On August 2, 1993, Edna Valentine transferred all of the assets from the decedent's Merrill Lynch Account #795-12D39 to a new account #795-60Y12 in her name and the name of the decedent. The decedent's Merrill Lynch Account remained in his sole name from 1962 to August 2, 1993. The defendant, Edna J. Valentine, signed papers on July 27, 1993 initiating this transfer process. By August 3, 1993, all security positions formerly held in the decedent's sole account were transferred to the joint account by journal entries.

23. After the decedent's death, the balance of the brokerage account no. 793- 60Y12, was transferred to a new account at the same institution in the joint names of the defendant and her

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no other way that it could have been done except through his Will, and I have not seen his Will, and I don't recall whether she had a copy of it with her, but for us to change the ownership, the only way we could have done it was to be if we had gone through some legal procedure other than just the adding of her name as a joint tenant, and then she would become the survivor upon his death."

daughter.

VIRGINIA STATE FEDERAL CREDIT UNION ACCOUNT

24. The Virginia State Federal Credit Union Account, No. 3339, was opened on September 23, 1986, in Petersburg, Virginia. The account was carried under the decedent's name and social security number. The decedent's social security number, SS No. 422-29-9937, was the only personal identification number to appear on the credit union account.

25. The decedent was the source of the funds that made up the Credit Union Account. A total of four deposits were made to the Credit Union account. The last deposit to the account was made in 1990. No withdrawals were made from the account during the decedent's lifetime.

26. Quarterly statements were mailed to the decedent's address in the District of Columbia. Interest on the account was reported under the decedent's social security number, and he was the sole taxpayer on the income.

27. The Court is unable to credit the defendant's assertion that she deposited any of her own funds into the credit union account because she lacks supporting documents to prove what, if anything, she may have deposited into the account. The Court accepted Charles Goldstein, the Court -appointed auditor, as an expert in forensic accounting. The court-appointed auditor was not able to account for any deposits made by the defendant into the Credit Union account.

28. The Court-appointed auditor further found that Ms. Valentine did not contribute any funds to the Merrill Lynch account. Ms. Valentine admitted to the Court-appointed auditor that she had no holdings or investments with the decedent.

29. The defendant Edna Valentine is a resident of Petersburg, Virginia. Peggy Custis is the CEO of the Virginia State University Federal Credit Union located in Petersburg, Virginia. Ms. Custis is a friend of the defendant, Edna Valentine. The defendant provided Ms. Custis transportation in her automobile to and from Petersburg, Virginia to the District of Columbia to testify in the above-captioned case. Ms. Custis discussed her testimony with the defendant and her family during these car trips in violation of the Court's admonition

against such discussions.

30. Peggy Custis changed her testimony in Court after discussing her previous day's testimony with the defendant and her family during the car trips to and from Court.

31. The testimony of Ms. Custis failed to establish that the account was opened as a joint account. Ms. Custis abandoned normal and customary Credit Union banking practices when dealing with Edna Valentine. There were numerous irregularities connected with the handling of the decedent's Virginia State Federal Credit Union account. Routine banking practices were suspended or simply ignored because of Ms. Custis's familiarity with Ms. Valentine.

32. The credit union account was opened in the name of Daniel B. Delaney but with incomplete signatures. There was no joint account election made by decedent. The decedent did not sign the card entitled "Joint Account." Although the names of the decedent and the defendant appear on the account card, both names were filled in by the defendant. There is no signature of the decedent authorizing the opening of a joint account with or without right of survivorship. Nor was there evidence to show that the Certificates of Deposit which funded the account, in part, were titled jointly.

33. The Court finds that the credit union account was, in fact, a single account in the decedent's sole name. The Court finds that the assets funding the account were the decedent's sole property. At most, the evidence shows that the defendant acted as a courier and depositing agent for the decedent, except in the case of the largest deposit of $50,000.00, which was made by the decedent directly to the credit union by mail. The decedent was the primary account party and was regarded as "owner" of the credit union account.

34. The Court does not credit the defendant's testimony that the Virginia State University Federal Credit Union account was a joint account. The defendant termed the credit union account as " our account" and as " our nest egg for making joint purchases such as automobiles, or a house." There is no evidence, however, that the decedent nor the defendant treated the account as having joint ownership. No funds were ever withdrawn from the account by either the decedent or Edna Valentine during the decedent's lifetime. Although the

defendant testified that she could have used the account at any time she wanted, she made no such use. Even
when the decedent allegedly reneged on his promise to contribute to the 1991 purchase of defendant's Dodson Road residence in Petersburg, Virginia, the defendant did not access the account to fund the down payment. Rather, according to her testimony, she "had to borrow money" from her daughter to complete the purchase.

35. The Court finds that no *inter vivos* gifts of the account assets were made by the decedent. No gift tax returns were filed for any of the deposits into the account, although two of the deposits exceeded the annual $10,000.00 gift tax exclusion.

36. The Court discredits the defendant's testimony that the decedent made a gift of his accounts to her to avoid probate which is negated by the fact that the decedent executed a Last Will and Testament dated July 31, 1993.[4]

37.The decedent's Last Will and Testament provided that "all I own in any form is my property, with no pre death gift intended." The Court finds that the decedent viewed both the credit union account and the brokerage account as his sole property.

38. After the decedent's death, the balance of the credit union account was transferred to another account at the same institution in the defendant's sole name.

39. The defendant transferred the balances of both the credit union account and the brokerage account to other accounts in her sole name or under her control, where funds were expended and distributed to other members of her family.

40. The court-appointed auditor has reviewed the history of both accounts subsequent to August 6, 1993 and has filed reports with the Court. The auditor also testified during two days of trial in 1997. The final report of the auditor was filed with the Court on September 2, 1997. The Court accepts and fully credits thecontent of that report.

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[4] The record of this case reflects that the decedent executed at least three Last Wills and Testaments

41. The disputed accounts are the property of the Estate of Daniel B. Delaney. The Estate is entitled to a judgment against defendant in an amount that reflects what monies are still retained by the defendant. The court-appointed auditor calculated the estate assets held by the defendant as of August 27, 1997, page 4 of the Auditor's Final Report, as follows:

Balance remaining in the ML Accnt #91 as of January 23, 1997	**$ 604,546.95**
Add: Net withdrawals from ML Acct #91 Over the audit period	**$ 304,134.94**
Add: Income lost due to withdrawals From the account over the audit period	**$ 28,422.99**
Total amount for ML Accnt #91 as of January 23, 1997	**$ 937,104.88**
Balance remaining in VSUFCU Accnt #3339 as of August 6, 1993	**$ 84,689.69**
Add: Interest & Deposits earned in This account over audit period	**$ 1,574.93**
Add: Income lost over the audit period Due to closing account	**$ 14,941.29**
Total amount for VSUFCU Accnt #3339 as of January 23,1997	**$ 101,205.91**
Total assets held by the defendant As of January 23, 1997	**$ 1,038,310.80**
Less: Amount deposited by the Defendant on February 11, 1997	**($ 595,245.75)**
Add: Interest lost on Merrill Lynch Accnt #91 withdrawals from January 23, 1997 through August 27, 1997	**$ 16,668.66**
Add: Interest lost on VSUFCU Accnt #3339 closing from January 23, 1997 through August 27,1997	$ 3,023.25
Total estate assets held by defendant as Of August 27, **1997**	$ 462,756.96

42. The Court accepts the foregoing calculation.

43. The decedent's Last Will and Testament contained a forfeiture clause in Article XVI which addressed challenges to the Last Will and Testament and the consequences thereof.

44. The defendant, Edna Valentine, challenged the decedent's Last Will and Testament.

CONCLUSIONS OF **LAW**

Daniel B. Delaney died a domiciliary of the District of Columbia on August 6, 1993. During his life, Mr. Delaney, resided at his home located at 620 Nicholson Street, NW, Washington, DC. This Court has jurisdiction over the instant probate matter, as it is a long-standing principle that where the decedent was domiciled in the District of Columbia, the Superior Court has jurisdiction to probate the estate. See In re EstateofDapolito. 331 A.2d 327 (D.C. 1975).

This case involves a dispute over ownership of two accounts: Virginia State University Federal Credit Union Account No. 3339 and Merrill Lynch, Pierce. Fenner & Smith, Incorporated Account No. 95-60Y12. The decedent's credit union account, established in 1986, is located in Virginia. The decedent's original brokerage account at Merrill Lynch was established in the District of Columbia in 1962, at the Connecticut Avenue, NW branch office of Merrill Lynch, and it remained there until 1989 when the stockbroker assigned to the account moved to a Virginia office. The decedent was the source of all funds deposited in both accounts. The Personal Representative of the Estate of Daniel B. Delaney, and certain interested parties who participated at trial, claim that the date of death balances in both accounts are assets of the estate. Defendant Edna J. Valentine claims that the balances at death belong to her as the surviving joint tenant.

Choice of **Law**

The Defendant argues that the law of Virginia applies to both the credit union account and the brokerage account. Upon consideration and analysis of choice-of-law principles, this Court finds that District of Columbia law applies to this case for the following reasons: (1) the burden of proof to rebut the presumption of a convenience account is a procedural matter governed by the law of the forum; (2) there is no true conflict with the law of Virginia, thus the forum law applies by default; and (3) under a choice of law analysis, the District of Columbia has a greater interest than Virginia in applying its law to this case. First, procedural matters are governed by the law of the

forum. Huang v. D'Albora, 644 A.2d 1, 4 (D.C. 1994); Fowler v. A & A Co.. 262 A.2d 344, 347 (D.C. 1970). Presumptions and burden of proof involve matters of procedure, and like other matters of procedure, they too, are governed by the law of the forum. *See* Koehne v. Price 68 A.2d 806 (D.C. 1949). Likewise, the principles applicable to the quality and degree of evidence are governed by the law of the forum. Osborne v. Osborne, 134 A.2d 438 (D.C. I957); *see also* Vernon v. Aubinoe. 269 A.2d 620 (Md. 1970); Vicars v. Atlantic Discount Co.. 140 S.E. 2d 667 (Va. 1965). Thus, the law of the District of Columbia governs the burden of proof and the standard of proof in this case.

Secondly, where there is no true conflict with the law of Virginia, the forum law applies by default. A "true conflict" exists only where two jurisdictions have an interest in applying their law to the case and the law of each is different. GEICO v. Fetisoff. 958 F.2d 1137, 1141 (D.C. Cir.1992). Under the law of the District of Columbia, the individual claiming that there was a gift of the account funds is charged with the burden of proof to rebut the presumption of a convenience account. Davis v. Altmann. 492 A.2d 884 (D.C. 1985). On the other hand, Virginia statutory law[5] created a presumption, contrary to Virginia's common law, that any joint account is a survivorship account unless it is proven by clear and convincing evidence that at the time the account was opened the decedent-depositor had a different intent than to create a survivorship account. Va. Code Ann. §6.1 -125.5 (Michie 1993); Higgins v. Bowdoin. 380 S.E. 2d 904 (Va. 1989). This Court notes that the law of this forum and the statutory law of the foreign jurisdiction dffer. Nevertheless, no "true conflict" exists because Virginia has no interest in applying its law to this case.

The Virginia presumption of survivorship for joint

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[5] Virginia Code section 6.1-125.5 states that sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created.

deposits at financial institutions does not apply, by its own terms, to the credit union account nor to the brokerage account in the instant matter. The Virginia State Credit Union account was not, in fact, a joint account; thus the Virginia statutory presumption as to "joint accounts" would not apply to the credit union assets.

The Virginia statutory presumption does not apply to the Merrill Lynch brokerage account. The brokerage account does not appear to qualify as an "account" under the Virginia statute. The Virginia statute defines an "account" as a contract of deposit of funds between a depositor and a financial institution. *See* Va. Code Ann. §6.1-125.1. According to Virginia case law. "the relationship between a financial institution and its depositor is that *of debtor and creditor*.. this relationship is prerequisite to the existence of any 'contract of deposit' or checking account.... [or] other like arrangement' included within the definition of 'account' in this section." Bennet v. First & Merchants Nat'l Bank. 335 S. E.2d 888 (Va. 1987)(emphasis added). In the instant case, the relationship between the decedent and the stock brokerage firm was that of principal and agent, not that of debtor and creditor. The decedent managed his investments through the services of the stock brokerage firm. Furthermore, according to Virginia case law, investments purchased with the decedent's funds are assets which remain a part of the decedent's estate. *See* Bennet, 335 S.E. 2d at 891 (where the decedent had contributed all the funds on deposit in the joint account, the funds withdrawn from the account during his lifetime to purchase the Treasury Bill belonged solely to him.) The decedent's Merrill Lynch brokerage account was an *investment* account. The assets in the decedent's Merrill Lynch brokerage account were used to purchase investment holdings. Therefore, since the decedent's assets do not meet the Virginia definition of an "account" protected by the statutory presumption, Virginia has no interest in applying its law.

This Court notes that the Virginia statutory law is inapplicable to accounts created prior to the statute's effective date. According to the Virginia Code:

> "nothing herein shall affect the common-law presumption of convenience now existing between persons not married to each other in joint accounts that were created

prior to July 1, 1980, insofar as the ownership of the funds, whenever deposited... and such cases shall continue to be decided pursuant to the precedents of the Virginia Supreme Court."

Va. Code Ann. §6.1-125.16. The original Merrill Lynch original account, opened in 1962, was established approximately 18 years prior to the Virginia Code's effective date, was opened solely in the name of the decedent with the decedent's sole funds and the decedent and the defendant were never married.[6] The "new" account was created on August 2, 1993, four days before the decedent died. This Court further notes, that where the Virginia statutory presumption is irrelevant, Virginia common law would apply. *See* Higgins v. Bowdoin. 380 S.E. 2d at 907. The *case* law of Virginia is the same as that of the District of Columbia. In both jurisdictions, a joint account established without consideration is presumed to be for the convenience of the depositor and the surviving joint tenant has the burden of establishing ownership by inter vivos gift. Davis v. Altmann. 492 A.2d at 885; Higgins v. Bowdoin. 380 S.E. 2d at 907(stating but not applying the common law rule); Wrenn v. Daniels. 106 S.E. 2d 126, 131 (Va. 1958) (presumption of convenience is strengthened by the illness or infirmity of the depositor).

The Court further finds that the protection of Virginia institutions is not an issue in this matter. This case presents claims against a Virginia resident arising from transactions involving personal property of a District of Columbia decedent. Moreover, in cases involving the ownership of a decedent's personal property. Virginia courts recognize and apply the law of the decedent's domicile. Kettler v. Greeley, 176 S.E. 2d 332 (Va. 1970); French v. Short. 151 S.E. 2d 354 (Va. 1966)(under Virginia law. a decedent's personal property passes according to the law of the state where he was domiciled at his death).

This Court finds that there is no true conflict between the law of the forum and the law of the foreign jurisdiction. *See*

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[6] The Court notes that the decedent's death certificate indicated that the decedent was never married **and the** Court notes that the defendant was the informant of the information contained in the decedent's death certificate.

Kaiser-Georgetown Community Health Plan. Inc. v. Stutsman. 491 A.2d 502, 509 (D.C. 1985)(even in the event of a "true conflict," the forum law will be applied unless the foreign state has a greater interest in the controversy). The District of Columbia has a greater interest than Virginia in applying its law to this case. Under District of Columbia conflicts of law principles, the court is required to evaluate the governmental policies underlying the applicable conflicting laws in order to determine which jurisdiction's policy would be most advanced by having its law applied to the facts of the case. Williams v. Williams, 390 A.2d 4, 5-6 (D.C. 1978); Rafferty v. Nynex Corp.. 60 F.3d 884 (D.C. Cir. 1995). It appears that the Virginia statute creates a presumption of survivorship in order to minimize confusion and inconvenience to financial institutions.

The District of Columbia has an overriding governmental interest in applying its law to this case. The District of Columbia Court of Appeals has opined that "the public policy considerations for the presumption of a convenience account are of the highest magnitude. They are the need to prevent fraud, overreaching, and deceit, often culminating after the other party to the transaction is dead." Davis v. Altmann. 492 A.2d at 887. Thus, this Court finds that the District of Columbia has the greatest interest in resolving the question of ownership in the instant probate matter.

District of Columbia law

Under District of Columbia law, the individual who claims that there was a gift of the account funds is charged with the burden of proof to rebut the presumption of a convenience account. Davis v. Altman, 492 A.2d at 885. The burden of proving that a transfer was an *inter vivos* gift falls upon the person asserting the gift. 492 A.2d at 885; Dugean v. Keto, 554 A.2d 1126, 1134 (D.C. 1989). Because the allegation of an inter vivos gift followed the death of the alleged donor, the gift must be proven by clear and convincing evidence. Uckele v. Jewett, 642 A.2d 119, 123 (D.C. 1994); Duggan v. Keto. 554 A.2d at 1134; Estate of Presgrave v. Stephens. 529 A.2d 274, 280 (D.C. 1987).

Thus, the Court finds that the defendant, Edna Valentine, has the burden of proving, by clear and convincing evidence,

that the accounts in question were not convenience accounts. Likewise, Edna Valentine has the burden of proof, by clear and convincing evidence, that the accounts in question were *infer vivos* gifts to her from the decedent in order to support her assertion that she has a right of survivorship in the accounts.

The Court will first address the Merrill Lynch account. The Court finds that the defendant Edna Valentine has failed to rebut the presumption that the Merrill Lynch account was a convenience account. The defendant offers no evidence that convinces this Court that the decedent did not intend to create the account merely for his own convenience, nor does the defendant offer clear and convincing evidence that the decedent made an *inter vivos* gift of the assets.

The Court finds that the account was created in response to the decedent's desire to give Ms. Valentine access to his funds for the purpose of handling his financial affairs on his behalf while he was hospitalized. The Court finds that on at least two instances prior to the creation of the "new" Merrill Lynch account, Mr. Delaney had attempted to give Ms. Valentine a power of attorney so that she could act on his behalf in reference to his financial affairs. The first "power of attorney" had no effect, in that it was not recognized by institutions with which Mr. Delaney desired Ms. Valentine to handle his concerns. The second "power of attorney*' was executed on July 19, 1993, while Mr. Delaney was at Providence Hospital, and on that same day, the decedent was transferred to Washington Hospital Center for chemotherapy and radiation. Thus, the Court finds that Mr. Delaney desired to create a means by which the defendant (a) would be recognized, as his agent, by the financial institutions with which he held his accounts; and (b) would have authority to access his accounts: and (c) could handle his financial affairs on his behalf.

The original Merrill Lynch account, opened in 1962. was solely in the name of the decedent for approximately 30 years until four days before his death. The "new"' Merrill Lynch account, account no. 795-60Y12, was opened as a "Joint Account with Right of Survivorship." The defendant, therefore, claims a right of survivorship in the Merrill Lynch account assets. Nevertheless, where a party opens a joint account for himself and another without consideration, the account is

presumed opened for the convenience of that party. Davis v. Altmann, 492 A.2d at 885: Edstrom v. Kuder. 351 A.2d 506, 509 n.7 (D.C. 1976). In this case, there is no evidence of any consideration given on the part of the defendant. The Court finds that the decedent and the defendant had a long-term relationship, expanding over approximately sixty years. The defendant was not employed by the decedent, nor was there evidence of any arrangement in which the defendant was to perform tasks in exchange for compensation.

The record shows that the "new" Merrill Lynch account was funded solely by the decedent's assets. As indicated on the Merrill Lynch transfer form submitted in evidence, "all assets" and "all cash" from the decedent's account number 795-12D39 were transferred into the new account now in question. There is no evidence that the defendant contributed to the decedent's original account, nor is there evidence that the defendant contributed any assets to the "new account."

Furthermore, in accordance with the holding of the District of Columbia Court of Appeals, the presumption of a convenience account applies in all cases where the funds have been contributed by one of the parties *even where the printed bank card signed by the parties recites a right of survivorship.* Davis v. Altmann, 492 A.2d at 885 (emphasis added); Imirie v. Imirie. 100 U.S. App. D.C. 371, 372, 246 F.2d 652, 653 (1957). In the instant case, the application form creating the joint account at Merrill Lynch, signed by the decedent as primary account holder and signed by the defendant as the secondary holder, indicates a joint account with right of survivorship. All of the funds were Mr. Delaney's transferred funds. Thus, the Court finds that the presumption of convenience applies to this case, even though the account was set up as a joint account with right of survivorship. The Defendant has failed to meet her burden of proof that the Merrill Lynch account was anything other than an account of convenience.

The Court further finds that the defendant has failed to prove, by clear and convincing evidence that the decedent made an *inter vivos* gift of the Merrill Lynch assets. The requisites of a valid *inter vivos* gift are delivery, intention on the part of the donor to make a gift, and absolute disposition of the subject of

the gift. Uckele v. Jewett, 642 A.2d 119,123 (D.C. 1994); Duggan v. Keto. 554 A.2d 1126, 1134 (D.C. 1989). The funds were never delivered to the defendant; rather, the funds were transferred by ledger entry to the new account initiated by the defendant herself. There is no evidence that the decedent intended to make a gift; rather, the record shows that the decedent was of the mind that all assets he owned remained his at his death, as he so stated in his Last Will and Testament. There is no credible evidence of the decedent ever giving a large gift to the defendant. The Court finds that the Merrill Lynch account was an account of convenience.

The Court now turns to the status of the Virginia State University Federal Credit Union account. The Court finds that the defendant Edna Valentine has failed to rebut the presumption that the Credit Union account was a convenience account. The defendant offers no evidence that convinces this Court that the decedent did not intend to create the account merely for his own convenience, nor does the defendant offer clear and convincing evidence that the decedent made an *inter vivos* gift of the assets.

The decedent was the sole source of all funds deposited to the credit union account. A total of four deposits were made to the credit union account. No withdrawals were made during the decedent's lifetime. The account was carried under the decedent's name and social security number and the decedent was the sole taxpayer of taxes levied on the account. The defendant made no contribution of funds to this account, nor is there evidence of any consideration given on the part of the decedent.

The defendant asserts that the credit union account was a joint account. As discussed above, the presumption of a convenience account applies in all cases where the funds have been contributed by one of the parties *even where the printed bankcard signed by the parties recites a right of survivorship.* Davis v. Altmann. 492 A.2d at 885 (emphasis added). Thus, the presumption of convenience extends to joint accounts with right of survivorship. In the instant case, however, the credit union account is blanketed by the presumption of convenience, with room to spare, as this Court finds that the credit union account *is not* a joint account. As stated in the Findings of Fact, the

evidence shows, at most, that the defendant had acted as a courier and depositing agent for the decedent.

In effort to meet her burden of rebutting the presumption of a convenience account, the defendant presented the testimony of Peggy Custis, CEO of the Virginia State University Federal Credit Union. A presumption is never overcome by testimony, even if uncontradicted, if the [fact finder] disbelieves the testimony. Uckele v. Jewett. 642 A.2d at 124; Davis v. Altmann. 492 A.2d at 887(quoting Koehne v. Price. 68 A.2d 806, 887 (D.C. 1949). Ms. Custis testified that the decedent's credit union account was created as a joint account with the defendant, Ms. Valentine, as joint owner of the funds. Nevertheless, where evidence presented to rebut a presumption raises an issue of credibility, it is for the trier of fact to determine whether the presumption has been defeated. Uckele v. Jewett. 642 A.2d at 124 (citing Rametta v. Kazlo, 418 N.Y.S.2d 113, 114-115(1979). This Court discredits the testimony of Ms. Custis because she altered her testimony in Court after discussing her previous day's testimony with the defendant and her family in violation of the Court's admonition against such discussion. Thus, the presumption of a convenience account is not defeated.

The Court further finds that the defendant failed to prove, by clear and convincing evidence, that the decedent made an *inter vivos* gift of the credit union account assets. *See* Duggan v. Keto. 554 A.2d at 1134 (the burden of proving that a transfer was an inter vivos gift falls upon the person asserting the gift). Furthermore, "the evidence must show that the gift took effect immediately; a gift intended to take effect in the future is not an *inter vivos* gift." Id. The defendant, however, has failed to prove intent and delivery, requisites of a valid *inter vivos* gift. There is no evidence that Daniel Delaney intended to give the credit union funds to the defendant during his lifetime. The decedent never surrendered power of dominion and control over the credit union account. The address of record was the decedent's Washington. D.C. address to which all statements were mailed. No withdrawals were made during his life. The defendant herself testified that she never thought that she had the authority to make a withdrawal from the account while the decedent was alive. The defendant testified that the decedent

refused to help her to pay for her house on Dodson Road, Petersburg, Virginia. There was no delivery of the credit union funds, or any portion thereof, to the defendant. The decedent carried all tax liability, whereas the defendant had no tax consequences in connection with the credit union account. No gift tax was ever paid even though amounts deposited to the account exceed the $10,000 annual limit. The Court finds that there was no *inter vivos* gift of credit union funds.

Finally, the Court will address the *in terrorem* clause in the decedent's Last Will and Testament. Item XVI of the Last Will and Testament of Daniel B. Delaney states:

> If any beneficiary or my Executor challenges my bequests, any amount due them will be cancelled and revert back to my estate, to be distributed to the above named charities.

By inclusion of such clause, the Will provided for forfeiture of interest of any person contesting the will and, under the doctrine of *in terrorem,* said interest shall be disposed of as though the challenger's name had not been mentioned in the Will. See Barry v. American Security & Trust Co.. 77 U.S. App. D.C. 351: 135 F. 2d 470 (1943); Sullivan v. Bond, 198 F.2d 529 (D.C. Cir. 1952). The defendant, Edna J. Valentine, challenged the Will two years after the probate of the Will and commencement of the administration of the decedent's estate, proceedings of which she had notice. The Court notes that "actions for construction of a will or declarator)' relief should not be construed as a contest of the will." Wachovia Bank and Trust Co.. N.A. v. Buchanan. 346 F. Supp. 665, 671 (D.D.C. 1972). In the instance case, however, the defendant did not seek legal interpretation of the Will, nor did she seek declaratory relief; rather the defendant untimely challenged the bequests as memorialized in the Will by asserting an argument of fraud. Thus, the Court finds that the defendant contested the Will, therefore, the *in terrorem* clause applies.

WHEREFORE, it is on this 23rd day of March, 1999, hereby

ORDERED, that the Merrill Lynch account, account no.795-60Y12 is the sole property of the decedent, and an asset of the Estate of Daniel B. Delaney; and it i is further

ORDERED, that the Virginia State University Federal Credit Union account, account no. 3339, is the sole property of the decedent, and an asset of the Estate of Daniel B. Delaney; and

it is further

ORDERED, that the assets held in escrow, are the assets of the Estate of Daniel B. Delaney; and it is further

ORDERED, that the defendant Edna J. Valentine has forfeited her bequest under the decedent's Will; and it is further

ORDERED, that the property specifically bequethed to the defendant, Edna J. Valentine, reverts to the estate, to be distributed to the named charities, in accordance with the Last Will and Testament of Daniel B. Delaney; and it is further

ORDERED, that judgment is entered against the defendant Edna J. Valentine in the amount of $462,756.96, plus post-judgment interest, in favor of the Estate of Daniel B. Delaney; and it is further

ORDERED, that the defendant Edna J. Valentine, shall restored said funds to the Estate of Daniel B. Delaney on or before, April 30, 1999; and it is further

ORDERED, that the failure to restore said funds, in full, may result in a finding of contempt of Court and may result in the issue of a bench warrant for the arrest of Edna J. Valentine.

SO ORDERED.

KAYE K. CHRISTIAN

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA PROBATE DIVISION

In re:

DANIEL B. DELANEY, **Admin. No. 1809-93**

Deceased Ward

Lawrence M. Elliott,

Personal Representative,
Plaintiff

FILED
DOCKETED
OCT 20 1999
Register Of Wills
Clerk of the Probate Division

V.

Edna J. Valentine,
Defendant.

JUDGMENT ORDER

This matter came before the Court for an Accounting bench trial. Witness testimony concluded on November 13, 1998. Upon consideration of the sworn testimony of the witnesses, the review of the exhibits admitted into evidence and a review of the applicable law, the Court issued its Findings of Facts, Conclusion of Law and Order, and an amended Order dated March 23, 1999 and April 29, 1999, respectfully. The Court holds that said Orders are the final judgment of the Court and reiterates that it is:

ORDERED, that the Merrill Lynch account, account no.795-60Y12 is the sole property of the decedent, and an asset of the Estate of Daniel B. Delaney; and it is further

ORDERED, that the Virginia State University Federal Credit Union account, account no. 3339, is the sole property of the decedent, and an asset of the Estate of Daniel B. Delaney; and it is further

ORDERED, that the assets held in escrow are the assets of the Estate of Daniel B. Delaney; and it is further

ORDERED, that the defendant Edna J. Valentine has

forfeited her bequest under the decedent's Will; and it is further

ORDERED, that the property specifically bequethed to the defendant, Edna J. Valentine, reverts to the estate to be distributed to the named charities, in accordance with the Last Will and Testament of Daniel B. Delaney; and it is further

ORDERED, that judgment is entered against the defendant Edna J. Valentine in the amount of $514,997.37, plus post-judgment interest, in favor of the Estate of Daniel B. Delaney; and it is further

ORDERED, that the defendant, Edna J. Valentine, shall restore funds in the amount of $462,756.96 to the Estate of Daniel B. Delaney on or before, April 30, 1999; and it is further

ORDERED, that Edna J. Valentine shall restore funds in the amount of $52,240.41 in calculated lost income to the Estate of Daniel B. Delaney on or before June 1, 1999; and it is further

ORDERED, that the failure to restore said funds, in full, may result in a finding of contempt of Court and may result in the issuance of a bench warrant for the arrest of Edna J. Valentine.

The Court further **ORDERS** that the assets held in escrow shall be released to the Personal Representative of the Estate of Daniel B. Delaney.

SO ORDERED.

10-21-99
Dated

JUDGE KAYE K. CHRISTIAN

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
PROBATE DIVISION

In re:
DANIEL B.. DELANEY, Admin. No 1809-93
Deceased Ward

FILED
OCT 20 1999
Register Of Wills
Clerk of the Probate Division

Lawrcnce M.Elloitt,
Personal Representative,
Plaintiff
V.
Edna J. Valentine,
Defendant.

JUDGMENT

This matter came before the Court for an Accounting bench trial Witness testimony concluded on November 13, 1998. The Court, alter considering the sworn testimony of the witnesses, the review of the exhibits admitted into evidence and a review of the applicable law, issued a Findings of Facts, Conclusion of Law and Order dated March 23, 1999 and an amended Order dated April 29, 1999. WHEREFORE, it is on this 20TH day of October 1999, ORDERED, that judgment is entered against the defendant Edna J. Valentine, and in favor of the Estate of Daniel B. Delaney in the amount of $514,997.37; and it is, further Ordered, that interest begins to accrue on the amount of $462,756. 96 at six percent (6%) per annum effective April 30, 1999, on any of the $462,756.96 amount unpaid as of that date and effective June 1, 1999 on any of the $52,240.41 amount unpaid as of that date[1].

CLERK OF THE COURT

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[1] See, Delaney v. Murphy. 338 A.2d 432 (DC. 1975)

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SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA
PROBATE DIVISION

LAWRENCE M. ELLIOTT,
Personal Representative of the
Estate of Daniel B. Delaney,
Plaintiff,
v.
Edna J. Valentine
Defendant

Admin No. 1809-93
Estate of Daniel B.Delaney
Judge Wendell P. Gardner. Jr.

MEMORANDUM OPINION AND ORDER

Procedural Posture

Plaintiff, the Personal Representative of the above-referenced estate, filed on June 27, 1995, a suit alleging tortious conduct by the Defendant. On August 9, 1995, the Defendant responded by filing a Special Appearance and Motion for Dismissal for Want of Personal Jurisdiction, or In The Alternative, For Forum Non Conveniens. An Opposition to the Motion to Dismiss For Want of Personal Jurisdiction or In The Alternative, For Forum Non Convenient was filed by the Plaintiff *on* August 31, 1995. Plaintiff is the Personal Representative of the estate of a deceased District of Columbia domiciliary. The Defendant who resides in Petersburg, Virginia, was a friend of the decedent and is a beneficiary under his Will.

Plaintiff asserts that Defendant is subject to Jurisdiction in the District of Columbia under the District of Columbia's long-arm statute as codified under D.C. Code 5 13-423 (a) (3) (Repl . 1995). Defendant contends that she is not subject to personal jurisdiction in the District of Columbia because she does not meet the Jurisdicitonal predicate of D.C. Code § 13-423 (a) (3) (Rep 1. . 1995) and argues alternatively that the

District of Columbia is an inconvenient forum.

Analysis

To assert personal jurisdiction over a nonresident Defendant, the requirements of the District of Columbia's "long arm" statute must be met and the would-be Defendant must have sufficient contacts with the jurisdiction of the Plaintiff's forum so as to make the assertion of jurisdiction over the Defendant constitutionally permissible. Aiken v. Lustine Chevrolet, Inc.. 392 F.Supp. 883, 884 (D.D.C. 1975).

District of Columbia's Long Arm Statute

Plaintiff alleges personal jurisdiction based upon Defendant's conduct under D.C. Code § 13-423 (a)(3)(Repl. 1995), which provides that "[a] District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to claim for relief arising from the person's causing tortious injury in the District of Columbia by an act or omission in the District of Columbia-"

The Personal Representative's complaint alleges that the Defendant has directly engaged in acts within the District of Columbia that amount to intentional torts, namely, fraud upon the decedent and conversion of property belonging to his estate. The complaint alleges that injury occurred on or about July 27, 1993 in the District of Columbia when the signature of the decedent was unlawfully procured by the Defendant to change the decedent's Merrill-Lynch Cash Management Account (located in the Commonwealth of Virginia) from a individual account to a joint account with the right of survivorship. Specifically, the Plaintiff alleges that the Defendant unduly influenced decedent to execute new signature cards within the District of Columbia to obtain joint ownership of the Merrill-Lynch Account that resulted In the wrongful conversion of approximately $700,000 from the account by the Defendant, thereby causing injury to the decedent's probate estate located within the District of Columbia.

Further, the Plaintiff claims that this injury occurred in part as a result of the Defendant's fraudulently procuring an executed power of attorney from the decedent while he was hospitalized in the District of Columbia. In addition, the Plaintiff alleges that the Defendant wrongfully converted $80,000 from decedent's Virginia State University Credit Union Account and entered the

decedent's District of Columbia home before and after his death and converted personal effects, papers, documents and possessions allegedly to hide her conversion of monetary assets. "Such alleged injuries could only have been sustained in the District of Columbia." Aiken v. Lustine Chevrolet. Inc., 392 F.Supp. 883, 88S (D.D.C. 1975).

Here, the requirements of the District of Columbia's "long arm" statute are met, as the Defendant directly and voluntarily engaged in acts in the District of Columbia allegedly causing injury to the decedent's estate.

Due Process

Due process requires that a nonresident Defendant have certain minimum contacts with the forum so that the maintenance of a suit does not offend traditional notions of fair play and substantial justice. International Shoe Co. v. Washington, "326 U..S. 310, 31S (1945). "All that is required is some affirmative act by which the Defendant brings itself within the jurisdiction and establishes minimum contacts." Cohane v. Arpeja-California, Inc., 385 A.2d 153, 158 (D.C. 1978) (quoting Hanson v. Denckla, 357 U.S. 235 (1958).

Factors to be considered in determining whether the Defendant's acts have established minimum contacts with the forum include: 1) the reasonableness of requiring a Defendant to defend a suit; in the forum where it is initiated; 2) the foreseeability of injury to the Plaintiff as a result of actions or consequences of actions *oil* the Defendant in the forum; 3) whether the Defendant's activities upon which the Plaintiff's lawsuit is grounded caused a consequence in the forum; 4) whether the Defendant's contacts with the forum are of a quality and nature to manifest a deliberate and voluntary association with the forum; 5) whether the Defendant's contacts with the forum are related to the transaction upon which the lawsuit is grounded; and 6) whether the Defendant's contacts with the forum were such that it could reasonably anticipate being haled into court there. Daniels v. Knof. et al.,116 WLR 2053 , 2056(Super. Ct. 1988); See also Mouzavires v. Baxter, et al. , 134 A.2d 988, 993-96 (D.C. 1981); Sol Salins Inc. v. Sure Way Refrigerated Truck Transportation *Brokers*, 510 A.2d 1032, 1034-35 (D.C. 1986).

Addressing the six factors enumerated above in turn, the

Court, will determine whether an affirmative act of the Defendant has brought her within the forum and established the minimum contacts.

The Defendant has not detailed with any specificity why it would be unreasonable for her to have to defend this suit in the District of Columbia. She was a voluntary and frequent visitor while the decedent was hospitalized here immediately prior to his death and she visited the decedent's home in the District of Columbia subsequent to his death. Although the decedent lives some distance from the District of Columbia there is no allegation chat convenient transportation is not readily available to her should she have to appear in Court. Additionally, her attorney list an Arlington, Virginia mailing address which is located within greater metropolitan Washington area.

It is the Court's opinion that it was highly foreseeable that if Defendant engaged in unauthorized entry to the decedent's home and removed important paper, personal property and effects and refused to turn them over to the Plaintiff/Personal Representative, the decedent's estate would be injured.

Defendant's activities in which the lawsuit is grounded have caused delay in the administration of this estate and its attendant expenses, has created a tax liability on the estate without the benefit of the controverted assets as a source of funds for paying these taxes.

The nature and quality of the Defendant's contacts with this forum manifest deliberate and voluntary association with the forum. There has been no suggestion by either of the parties herein that any of Defendant's contacts with the forum giving rise to the lawsuit: were accidental inadvertent, or anything other than deliberate and voluntary.

It is clear that the Defendant's contacts with the decedent while he was ill in the hospital and the alleged unauthorized removal of his personal property, papers and effects from his home and subsequent refusal to return them are related to the transaction upon which this lawsuit is grounded.

The Defendant's contacts with forum were such that she could reasonably anticipate being haled into court: here because the conversion of household property and the decedent's important papers occurred here in the forum jurisdiction as well as the undue influence to procure a power of attorney which

allowed the conversion of funds from the Merrill-Lynch and Virginia State Credit Union accounts. No person in Virginia was injured by Defendant's contacts with the forum. However, it is alleged that the decedent's estate in this forum has been injured. Thus, it certainly would not be unreasonable to anticipate Defendant being haled to defend in this forum, since the injury has been alleged to the estate and the beneticiaries, the majority of whom are locals.

Taking these factors into consideration, the Defendant's acts establish the minimum contacts with the forum necessary so that maintenance of the instant suit does not offend traditional notions of fair play and substantial justice. Therefore, this Court *may* assert personal jurisdiction over the Defendant pursuant to DC. Code § 13-423 (a)(3)(Repl. 1995).

Forum Non Conveniens

Finally, the Defendant asserts that the District of Columbia is an inconvenient forum. However, a Plaintiff's choice of forum should rarely be disturbed. Gulf Oil Corp. v. Gilbert 330 U.S. 501, 508 (1947) . Therefore, the Defendant "bears a heavy burden in seeking dismissal on the ground of forum non conveniens, and unless the balance is strongly in favor of the defendant, the plaintiff's choice of a forum should be given deference." Forgotson v. Shea. 491 A.2d 523, 526 (D.C. 1985).

In Gulf the Supreme Court "identified two separate interests which must be considered in assessing a motion to dismiss for forum non conveniens - the private interest of the litigant, and the public interest." Cohane *v.* Arpeja-California inc.. 38S A. 2d 153, 156 (D.C. 1978) (quoting Carr v. Bio-Medical Applications of: Washington. Inc. 366 A.2d 1089, 1092 (D.C. 1976)). The factors relevant to the private interest, concern the ease, expedition, and expense of the trial. Id. These include the relative ease of access to proof; availability and cost of compulsory process; the enforceabilicy of a judgment once obtained; evidence of an attempt by the Plaintiff to vex or harass the Defendant by his choice of the forum and other obstacles to a fair trial. Td- The factors relating to the public interest include administrative difficulties caused by local dockets congested with foreign litigation;- the imposition of jury duty on a community having no relationship to the litigation; and the inappropriateness of requiring local courts to

interpret the laws of another jurisdiction. .Id.

Here, the Defendant argues that since Virginia is the location of the Merrill-Lynch Cash Management Account, the documents associated with said account, and the witnesses to the fund transfers, "the mere fact that the Plaintiff is administering an estate in the District of Columbia does not justify the expense and inconvenience which will necessarily follow to get all the evidence from Virginia to the District of Columbia." See Def.'s Special Appearance and Mot. For Dismissal at 4.

Although the Cash Management Account, documents and witnesses are located at a Merrill-Lynch Branch in Northern Virginia this is no impediment: 1) to the access to proof; 2) to the enforceability of a judgment; or 3) to a fair trial, since Northern Virginia is only a few miles away. Defendant has made no allegations that the Plaintiff was attempting to vex or harass her by the Plaintiff's choice of forum.

In examining the factors relating to the public interest, this case has as many local aspects as foreign aspects and thus can not be considered wholly foreign litigation. This community has a significant enough relationship to this litigation to warrant a District of Columbia jury, if necessary, to hear this case because the allegations consist of a District of Columbia domiciliary being unduly influenced and his personal effects located here being converted by the Defendant and his estate suffering a loss *as a* result thereof notwithstanding that the actual withdrawal of funds were from the Virginia office of Merrill-Lynch. Lastly, the case does not appear to involve the application of foreign law nor has the Defendant asserted that application of the same *its* required.

Here, the Plaintiff is the personal representative of an estate being administered in the District of Columbia, the decedent's domicile. The Plaintiff alleges that the decedent's estate was injured by wrongful acts committed by the Defendant in the District of Columbia. "This District itself, of course, has an interest in the resolution of such issues concerning one of its [deceased] residents." Aiken v. Lustine Chevrolet. Inc. 392 F.Supp. 883, 887 (D.D.C. 1975).

This Court finds that the balance is not strongly in favor of the Defendant and that the Plaintiff's choice of forum in the

District of Columbia is to be given effect.

Therefore, based upon the foregoing, it. is this

14th day of December, 1995,

ORDERED, that Defendant's Motion for Dismissal for Want of Personal Jurisdiction, or In The Alternative, For Forum Non Conveniens be and hereby is DENIED.

Judge Wendell P. Gardner, Jr.
Signed in Chambers

FILED
MAR 31 1997
Clerk Of The Probate Division

Superior Court of the District of Columbia Probate Division

In Re: Estate of **Daniel B. Delaney**

Admin. No. 1809-93

*

Order

This matter is before the Court on the Plaintiffs, Lawrence M. Elliott, Motion for Consideration of Summary Judgment and Motion for Summary Judgment. On January 23, 1997, this Court heard oral arguments on said motions from counsel for the Defendant and counsel for the Plaintiff. The Court denied the Motions for Summary Judgment because there were many controverted facts which went to the heart of the issues before the Court.

The Decedent, Daniel Boone Delaney, died from lung cancer at age 82, on August 6, 1993. The Plaintiff, Lawrence Elliot is a cousin of the Decedent. Although the Defendent, Edna Valentine, is of no relation to the Decedent, she had a long-standing relationship with the Decedent from early adulthood until the Decedent's death. During the summep of 1993, Daniel Delaney was diagnosed with cancer and was hospitalized.

On July 20, 1993, until his death, the Decedant began receiving chemotherapy treatments. In the hospital, the Decedent's illness progressed while, concurrently, the Defendent began spending more and more time with the Decedent. On July 18, 1993, the Decedent executed a will, hereinafter the "First Will", in which he left a substantial proportion of his assets to the Defendant.

However, the Decedent executed a subsequent will, hereinafter the "Second Will", on July 31, 1997 in which the Defendant's share of the estate was substantially diminished and in which the Plaintiff received a portion as did several

charities and friends of the Decedent. This "Second Will" also contained a no pre-death gift clause, expressing an intent that no pre-death gifts were to be made. The great bulk of the Decedent's estate was in the form of a Merrill Lynch Cash Management Account and a Virginia State Credit Union account. The Plaintiff alleges that the cummulative value of the two accounts exceeds $700,000.

On August 2, the day that the Plaintiff alleges that the Decedent's contition began to rapidly deteriorate, the Decedent signed a document changing the form of ownership of his Merrill Lynch Cash Management Account from sole ownership to joint tenancy, with the Defendant being the other joint tenant. The Plaintiff contends that this was done for the convenience of the Decedent, allowing the Defendant to manage the financial affairs of the Decedant at a time when he was physically incapable to do so for himself. The Defendant argues that the change of ownership to joint tenancy was intended to be an inter vivos gift. However, the possibility that the creation of the joint tenancy was intended as a gift runs counter to the no pre-death gift clause of the "Second Will", dated July 31,1993.

In the January 23, 1997 hearing, one of the issues before the Court, and raised by the Defendant as a defense to the Plaintiffs Motion for Summary Judgement, was whether the "Second Will", dated July 31, 1993, is fraudulent. The Defendant raised this issue in oral argument in open court on January 23, 1997, as well as in her Answer, dated February 1, 1996. Therein, the Defendant asserted she had knowledge of the "Second Will" and alleged that the "Second Will" is a forgery and a fraud. However, the ability to make this contention is premised upon the Defendant having standing to contest the will and the Defendant's contest being timely. Pursuant to D.C. Code § 20-305:

Except as provided in section 20-353 (b), any person may file a verified complaint to contest the validity of a will within 6 months following notice by publication of the appointment or reappointment of a personal representative under section 20-704.

Further, under Sup. Ct. R. 107, "an action to contest the validity of a will in accordance with D.C. Code § 20-305... may be commenced by any party in interest by filing a verified

complaint with the Register of Wills." Therefore, based on D.C. Code § 20-305 and Sup. Ct. R. 107, whether the Defendant has standing turns on whether she is an interested person.

In *Werner* v. *Frederick 68 App. DC. 158, 160 (1937),* the Court found that "a beneficiary in a prior will has an interest to contest a later one by virtue of which his share has been reduced or destroyed, and this whether or not he is an heir at law or next of kin of the testator." In the case before this Court, the Defendant is allotted a diminished share of the estate under the "Second Will" compared to her share under the "First Will", dated July 18, 1993. Pursuant to *Werner* v. *Frederick 68 App. D.C. 158,* the Defendant is an interested person, and thus, has standing to contest the will.

Since it is conclusively established that the Defendant has standing, the issue of timeliness must be addressed by the Court. The Court finds that the Defendant failed, herein, to contest the "Second Will" within the time limits proscribed by statute. D.C. Code § 20-903 (a) (1) , the controlling statute, states as follows:

All claims against the Decedent's estate, whether founded on contract or other legal basis, shall be barred aginst the estate, the personal representative, and the heirs and legatees, unless presented within 6 months after the date of the first publication of notice of the appointment of a personal representative.

The Defendant was mailed notice of the appointment of the personal representative, pursuant to requirements of D.C. Code § 20-704(a) and (b), on August 25, 1993. From the Court's examination of the Court jacket, the Court notes that the Defendant has consistently been on the Personal Representative's mailing list since August 25, 1993, prior to the case entering Probate on September 7, 1993. In a verification and certificate, dated December 7, 1993, the Personal Representative affirmed and declared that the " Personal Representative mailed or caused to be mailed a copy of the Notice of Appointment to the Defendant on August 25, 1993. Furthermore, the Personal Representative deposed and stated on April 18, 1994 that a copy of the Notice of After Discovered Will was received by the Defendant on March 28, 1994. Return receipts of verified mail found in the court jackets confirms this. Therefore, the Court concludes that the Defendant had

knowledge of the Personal Representative's appointment on or around August 25, 1993.

However, the Defendant did not contest the validity of the "Second Will" until the Defendant included this contest as part of her answer, dated February 1, 1996, to the Plaintiff's original complaint of June 27, 1995. There can be no doubt that the Defendant has failed to challenge the validity of the will in question within the aforementioned time constraints. The Defendant's caveat to the "Second Will" is, therefore, DENIED.

Wherefore, it is
this 31st day of March, 1997, hereby

ORDERED, that although the Defendant has standing, the Defendant's challenge is impermissibly late; and it is further

ORDERED, that the Court will proceed with a status hearing on April 16, 1997, at 9:15 a.m. in courtroom 215; and it is further

ORDERED, that the Court's Order of January 24, 1997, and subsequent Orders remain in full force and effect. Deputy Presiding Judge Probate and Tax Division (signed in chambers)

SO ORDERED.

Deputy Presiding Judge
Probate and Tax Division
(signed in chambers)

Kaye K. Christian

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Walter T. Charlton, Esq. 230 Kirkley Road Annapolis, MD 21410

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA PROBATE DIVISION

LAWRENCE M. ELLIOTT,
Personal Representative of the Estate of Daniel B. Delaney,

Plaintiff, v.

EDNA J. VALENTINE, Defendant.

) Admin. No. 1809-93
) Estate of Daniel B. Delaney
) Judge Kaye K. Christian

Order

The above-captioned matter comes before the Court for issuance of an Order addressing the parameters of the issues to be addressed before the Court at the next status hearing to be held on July 3, 1997. The Court in the last hearing on April 16, 1997, advised that an Order would be forthcomming setting forth said parameters. As a background, the Court will reiterate the facts of this case and the Court's Older of March 31, 1997.

As noted in the March 31, 1997 Order:

> The Decedent, Daniel Boone Delaney, died from lung cancer at age 82. on August 6, 1993. The Plaintiff, Lawrence Elliott, is a cousin of the Decedent. Although the Defendant, Edna Valentine, is of no relation to the Decedent, she had a long-standing relationship with the Decedent from early adulthood until the Decedent's death. During the summer of 1993, Daniel Delaney was diagnosed with cancer and was hospitalized
>
> On July 20. 1993, until his death, the Decedent began receiving chemotherapy treatments. In the hospital, the Decedent's illness progressed while, concurrently, the Defendant began spending more and more time with the Decedent. On July 18, 1993, the Decedent executed a

will, hereinafter the "First Will", in which he left a substantial portion off his assets to the Defendant.

However, the Decedent executed a subsequent will, hereinafter the "Second Will', on July 31, 1993 in which the Defendant's share of the estate was substantially diminished and in which the plaintiff received a portion as did several charities and friends of the Decedent. This "Second Will" also contained a no pre-deatb gift clause, expressing an intent that no pre-death gifts were to be made. The Great Bulk of the Decedent's estate was in the form of a Merrill Lynch Cast Management Account and a Virginia State Credit Union account. The Plaintiff alleges that the cumulative value of the two accounts exceeds $700,000.

On August 2, the day that the Plaintiff alleges that the Decedent's condition began to rapidly deteriorate, the Decedent signed a document changing the form of ownership of his Merrill Lynch Cash Management Account from sole ownership to joint tenancy, with the Defendant being the other joint tenant. The Plaintiff contends that this was done for the convenience of the Decedent, allowing the Defendant (to manage the financial affairs of the Decedent at a time when he was physically incapable to do so for himself. The Defendant argues that the change of ownership to joint tenancy was intended to be an inter vivos gift. However, the possibility that the creation of the joint tenancy was intended as a gift runs counter to the no pre-death gift clause of the "Second Will", dated July 31, 1993.

In the January 23, 1997 hearing, one of the issues before the Court, and raised by the Defendant as a defense to the Plaintiff's Motion for Summary Judgment, was whether the "Second Will", dated July 31, 1993, is fraudulent. The Defendant raised this issue in oral argument in open court on January 23, 1997, as we!l as in her Answer, dated February 1, 1996. Therein,

the Defendant asserted she had knowledge of the "Second Will" alleged that the "Second Will" is a forgery and a fraud. However, the ability to make this contention is premised upon the Defendant having standing to contest the will and the Defendant's contest being timely.

Pursuant to D.C. Code 20-305:

Except as provided in section 20-353 (b), any person may file a verified complaint to contest the validity of a will within 6 months following notice by publication of the appointment or reappointment of a personal representative under section 20-704

Further, under Sup. Ct. R 107, "an action to contest the validity of a will in accordance with D.C Code § 20-305...may be commenced by any party in interest by filing a verified complaint with the Register of Wills." Therefore, based on D.C. Code § 20-305 and Sup. Ct. R. 107, whether the Defendant has standing turns on whether she is an interested person.

In *Werner v. Frederick 68 App DC, 158. 160 (1937),* the Court found that "a beneficiary in a prior will has an interest to contest a later one by virtue of which his share has been reduced or destroyed, and this whether or not he is an heir at law or next of kin of the testator." In the case before this Court, the Defendant is allotted a diminished share of the estate under the "Second Will" compared to her share under the "First Will", dated July 18, 1993. Pursuant to *Werner v Frederick 68 App. D. C. 158,* the Defendant is an interested person, and thus, has standing to contest the will.

Since it is conclusively established that the Defendant has standing, the issue of timeliness must be addressed by the Court. The Court rinds that the Defendant failed, herein, to contest the "Second Will" within the time limits proscribed by statute. D.C. Code § 20-903 (a)(l), the controlling statute, states as follows:

All claims against the Decedent's estate, whether founded on contract or other legal basis, shall be barred against the estate, the personal representative, and the heirs and legatees, unless presented within 6 months after the date of the first publication of notice or the appointment of a personal representative.

The Defendant was mailed notice *of* the appointment of the personal representative, pursuant to requirements of DC. Code § 20-704(a) and (b), on August 25, 1993. From the Court's examination of the Court Jacket, the Court notes that the Defendant has consistently been on the Personal Representative's mailing list since August 25, 1993, prior to the case entering Probate on September 7, 1993. In a verification and certificate, dated December 7, 1993, the Personal Representative affirmed and declared that the Personal Representative mailed or caused to be mailed a copy of the Notice on Appointment to the Defendant on August 25, 1993. Furthermore, the Personal Representative deposed and stated on April 18, 1994 that a copy of the Notice of After Discovered Will was received by the Defendant of March 28,1994./ Return receipts of verified mail found in the court jackets confirms this. Therefore, the Court concludes that the Defendant had knowledge of the Personal Representative's appointment on or around August 25, 1993.[1]

However, the Defendant did not contest the validity of the "Second Will" until the Defendant included this contest as part of her answer, dated February 1, 1996, to the Plaintiffs original complaint of June 27, 1995. There can be no doubt that the Defendant has failed to challenge the validity of the will in question within the aforementioned time constraints. The Defendant's caveat to the "Second Will" is, therefore, Denied.

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[1] **The Court notes that Judge Wolf issued an Order on April 4, 1994 admitting to probate July 31, 1993 Will. The Court notes further that the Defendant received Judge Wolf's Order April 4, 1994.**

(Emphasis supplied).

The Court notes that the Defendant has filed on March 17, 1997, a Motion tor Leave to File Amending and Dispositive Motions: Including, a Motion to Vacate the Order Granting Probate: An Amended Answer. Cross Claims and Counterclaims; and Ancillary Evidence and Argument. Among the issues brought before the Court in this motion and subsequent motions arc the issues of "new evidence of fraud" and "a common law marriage between the Decedent and the Defendant."

The Court is surprised that the Defendant at this eleventh hour would seek to file said motions, and continue to file said motions. While the Court's March 31. 1997 Order was issued subsequent to March 17, 1997, surely the Court's Order of March 31, 1997, addresses the issue of whether Defendant's pleadings are timely.

The Court finds it incredible that at this late stags of the proceedings the Defendant is discovering she is the common law wife of the decedent. Based on the facts before the Court, the Court cannot credit the Defendant's untimely filing as due to ignorance or lack of sophistication. Certainty, Defendant has filed countless other pleadings in this case prior to March 17, 1997.

As stated above, the Defendant was mailed notice of the appointment of the personal representative on August 25. 1993. The Defendant has consistently been on
the Personal Representative' s mailing list since August 25, 1993, prior to the case entering Probate on September 7, 1993. The Defendant has had knowledge of the Personal Representative's appointment and role in this case since on or around August 25, 1993, however, the Defendant did not contest the validity of the "Second Will* until February 1, 1996.

As stated above in the Court's Order of March 31, 1997, while it was found that Defendant has standing to bring a claim against the estate, said claim must be brought timely pursuant to D.C. Code 20-903(a)(l). See above. It is clear to the Court that Defendant has failed to meet the requirements of the D.C. Code § 20-903(a)(l) in her motion of March 17, 1997, and related pleadings.

Therefore, the issues brought before this Court in

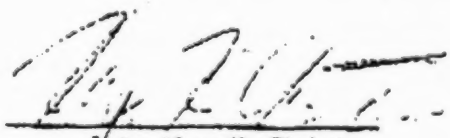
Defendant's Motion of March 17, 1997, and related subsequent pleadings are not properly before this Court. The Court hereby dismiss the issues raised in Defendant's Motion of March 17, 1997, Defendant's complaint of April 7, 1997, and all related pleadings because Defendant has failed to comply with D.C. Code § 20-903(a)(l). The Court will hold a status hearing on July 3, 1997, at 9:15 a.m. on the outstanding accounting matters in this estate

Wherefore, it is this _____ day of June, 1997 hereby

ORDERED, that the Court will hold a status hearing on July 3, J997, on the outstanding accounting matters in this estate; and it is further

ORDERED, that the issues raised in Defendant's Motion of March 17, 1997, Defendant's complaint of April 7, 1997, and all related pleadings are **DISMISSED.** Defendant had failed to comply with D.C. Code § 20-903(a)(l).

SO ORDERED.



Judge Kaye K. Christian
Signed in Chambers

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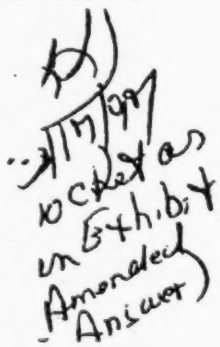
IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
PROBATE DIVISION

LAWRENCE M. ELLIOTT, Plaintiff v. EDNA J. VALENTINE Defendant	) Admin No. 1809-93



AMENDED ANSWER

Defendant, Edna J. Valentine, through counsel, hereby files pursuant to leave requested and based upon newly discovered fact, law and evidence of fraud in this case, her amended answer as follows.

Note: For the convenience of the court, each answering numbered paragraph is followed by the amendment printed in bold letters. Where there is no change in the amended answer as compared to the original answer the notation "(SAME)" is made.

Answer to Numbered Paragraphs in the Complaint (bold are amendments based upon new information and evidence):

1. Defendant denies that the document referenced is the Last Will and Testament and in fact asserts that the document is not the last Will and Testament of Daniel B. Delaney, that it is a forgery and a fraud. The

remaining allegations contained in paragraph one are denied.

And in further answer defendant states that investigation of the circumstances in the context of the purported will admitted to probate are that:

a) The purported signature of the decedent is not genuine but rather is a forgery described by a forensic documents and evidence expert in an Affidavit and accompanying report dated February 24th, 1997, as not signed by the Decedent and very probably a "tracing".

b) The size of the signature on the Will admitted to Probate is inappropriate when compared to known contemporaneous genuine signatures which are, due to the physical condition of the decedent at that time, greatly enlarged and less legible. Points a and b taken together lead to the inescapable conclusion that an old signature at a time when the decedent was in good health was used to make the tracing purported to be the signature on the will.

c) The purported witnesses to the purported Will dated July 31, 1993, are all close acquaintances or relatives of the Plaintiff in this case. Those witnesses are known to Mr. Elliott but can not yet be located for purposes of trial witnesses and have not yet been located by the Fraud and bunko department of the Metropolitan Police Department. That department is conducting an on-going investigation that is incomplete as of this date (March 14, 1997).

d) The circumstances under which this purported Will came into the file in this court are unclear. A delay of several months occurred after death, before the "will" was presented to the Court for probate by Caldwell, who stated it came from Elliott. Elliott had previously sworn that the other will filed, dated

July 18, 1993 was the only one he knew about. These two sworn statements are in basic conflict as to the very existence of a second will.

e) Just prior to the purported signing of this purported Will the decedent had made transfers to his common law wife, the defendant Edna J. Valentine, of the bulk of his liquid assets representing the contents of his Merrill Lynch "Money Management Account containing cash, and a substantial portfolio of stocks and bonds. Although Valentine was a constant companion of Delaney during the final month of his life, neither "will" was mentioned to her.

2. Denies the allegations contained in paragraph two for lack of information or knowledge sufficient to reach a conclusion as to the truth thereof. (SAME)

3. Admits the allegations contained in paragraph three. **And in further answer defendant states that during the relevant period of time she co-habitated at times in the District of Columbia with the decedent as husband and wife and at times in the State of Virginia as husband and wife and elsewhere on trips as husband as wife.**

4. Admits the allegations contained in paragraph four. **And in further answer defendant states that the decedent at some of the relevant times resided in the State of Virginia and elsewhere with the defendant Edna J. Valentine. Valentine and Delaney were represented to be husband and wife on many occasions wherever they co-habitated.**

5. Admits the allegations contained in the first sentence of paragraph five. While it appears that a document identified as a Will of Daniel B. Delaney was admitted to probate, defendant asserts that the document is a forgery and a fraud. It is believed and thus asserted that

Daniel B. Delaney's estate was located in the District of Columbia and in the Commonwealth of Virginia. **And in further answer on information and belief the decedent and the decedent's estate owned, prior to making inter vivos gifts to the defendant Edna J. Valentine, personal property located in the Commonwealth of Virginia. He also owned real property located within the State of Pennsylvania.**

6. Denies the allegations contained in the first sentence of paragraph six. Admits the second sentence of paragraph six. **(SAME)**

7. Admits the allegations contained in paragraph seven. **Defendant strikes her previous answer to paragraph 7 and in her amended answer states as follows: The fact that the decedent was 82 years old when he died is admitted. The statement that he is a never married bachelor is denied. The fact that he had no children and no surviving siblings when he died is admitted. And in further answer, defendant hereby states as follows:**

a) For over 30 years Delaney and Valentine were both eligible candidates for a valid marital relationship having no other spouses.

b) During that time, with short periods of separation, they were constant companions and cohabitated as man and wife in the District of Columbia in the State of Virginia and elsewhere.

c) Mr. Delaney on numerous occasions covering the span of 30 years held out to the public Ms. Valentine as his wife or Mrs. Delaney. They shared property, bank accounts, expenses and the benefits of life. They met with Valentine's family and friends of both Valentine and Delaney.

d) Delaney was buried without objection by Elliott or anyone else in the family plot of the Valentines, in Virginia.

e) Valentine submits that under the law of the District of Columbia Ms. Valentine was the common law wife of Mr. Delaney. This fact has impact on all aspects of this case.

f) And in further answer Valentine states that at the time of her previous answer she was unaware of the provisions of District of Columbia law resulting in a common law marriage under the probative facts and circumstances of this case.

8. Denies the allegations contained in paragraph eight for lack of information or knowledge sufficient to reach a conclusion as to the truth thereof. **And in further answer Valentine states that although she knew during recent years of the existence of Lawrence Elliott, as a mere acquaintance of Delaney on information and belief the Plaintiff has no family relationship either as a blood relation or by any relationship created by law or marriage.**

9. Admits the allegations contained in paragraph nine. Answering further, the twenty-year association was extremely close, the defendant and Daniel B. Delaney being devoted to each other and were constant companions. **And in further answer the relationship of the defendant and the decedent was that of husband and wife for a period of more than 30 years.**

10. Denies the allegations contained in paragraph ten except admits that she regularly conferred with hospital personnel during Daniel B. Delaney's final hospitalization and she remained at his bedside to the time of his death. **(SAME)**

11. Denies the allegations contained in paragraph eleven. **(SAME)**

12. Denies the allegations contained in paragraph twelve. **And in further answer Valentine states on information and belief that the signature of the decedent on**

the purported Will dated July 18th is also a forgery described by Valentine's forensic expert as not the signature of the Decedent, and very probably a "tracing". On information and belief the mechanism for obtaining a notarization on that version of the Last Will and Testament was the result of a placing of a tracing on papers purportedly subject to the notarization process. Although the decedent expressed the intent to leave his estate to Valentine, Valentine is without sufficient information at this time to explain how a "tracing" of the decedent's signature came to appear upon the version of the purported Will dated July 18th, 1993, which was apparently subjected to validation by a notary.

13. Denies the allegations contained in paragraph thirteen. **(SAME)**

14. Upon information and belief, admits the allegations in paragraph fourteen. **(SAME)**

15. Upon information and belief, admits the allegations in paragraph fifteen. **(SAME)**

16. Upon information and belief, admits the allegations in paragraph sixteen. **(SAME)**

17. Admits the allegations contained in paragraph seventeen. **(SAME)**

18. Denies for lack of information or knowledge sufficient to reach a conclusion as to the truth thereof the allegations contained in paragraph eighteen. **(SAME)**

19. Admits the allegations contained in paragraph nineteen only to the extent borne out by the referenced document which is the best evidence of its contents. **And in further answer Valentine states that on or about July 27th, 1993, decedent began the process of making the final and permanent gift of the previous "convenience account" over which Valentine was given a power of attorney for the convenience of Delaney. There is no doubt that the**

convenience account existed during the first stages of the final illness, but when Delaney finally knew his death was imminent, he decided to convert that convenience account over which he gave Valentine power of attorney to a permanent gift in her behalf. To that end, signature cards were obtained in accordance with this expressed wish, Delaney's Merrill-Lynch Broker was contacted, told personally by Delaney of his intent and wishes, and Valentine and Delaney both signed a signature card on July 27th in accordance with the expressed wishes of the decedent. Several days went by and on August 2nd, 1993, the decedent signed [dated] the signature card which was previously undated in error. The lack of the date was corrected on August 2, 1993 and the completed signature card retransmitted to Merrill Lynch card completing the gift process. On the following day, August 3rd, 1993, the transfer was completed on the books of Merrill-Lynch transferring the Delaney "convenience account" to a joint and survivor account with Valentine owning the survivorship interest. At all times during this "gifting process" Mr. Delaney, although physically weak, was of sound and disposing mind. Therefore, the statement that "the decedent owned a Merrill-Lynch cash management account as of July 30, 1993, is a legally questionable statement dependent entirely upon the date Mr. Delaney intended to and did make the final and binding gift transfer of all ownership rights in the Merrill-Lynch account. It is the position of Valentine that the transfer was primarily and substantially completed on July 27, 1993, and absolutely final on August 2nd, 1993, when the decedent signed his name to the signature card. He died four days later.

20. Denies the allegations contained in paragraph twenty. **(SAME)**

21. Admits that an account was opened at Merrill-Lynch bearing the number 795-60Y12 by Daniel B. Delaney and denies the remainder of the allegations contained in paragraph twenty-one except to the extent borne out by the referenced document which is the best evidence of its contents. **(SAME)**

22. Denies the allegations contained in paragraph twenty-two as stated. **(SAME)**

23. Denies for lack of information or knowledge sufficient to reach a conclusion as to the truth thereof the allegations contained in paragraph twenty-three. **(SAME)**

24. Denies the allegations contained in paragraph twenty-four. **And in further answer states as follows: the purported Will dated July 31, 1993, is a forgery, and appears on its face to have been prepared on the typewriter of Mr. Delaney. That typewriter was under the control of the Defendant Valentine for at least several months following the death of Delaney and was given to the Plaintiff herein as an afterthought in the fall of 1993 before the appearance of the "will" now in probate. Therefore on its face, in addition to being a forgery the purported "Will" appears to be a fraudulently prepared document prepared by the Plaintiff under circumstances involving fraud and deceit after the death of Delaney.**

25. The allegations contained in paragraph twenty-five are conclusions of law requiring no response but, to the extent deemed allegations of material fact, they are denied. **(SAME)**

26. Denies for lack of information or knowledge sufficient to reach a conclusion as to the truth thereof the allegations contained in paragraph twenty-six. **(SAME)**

27. The allegations contained in paragraph twenty-seven are denied as they are conclusions of medical condition which are beyond the ability of defendant, or

plaintiff, to conclude the truth thereof. **And in further answer upon information and belief the mental condition of the decedent was rational and coherent at least through August 4th, 1993.**

28. Denies the allegations contained in paragraph twenty-eight. Admits that ultimately, shortly before Daniel B. Delaney's death, she became convinced that his death was imminent. **And in further answer Valentine states that on August 5th, 1993, after Valentine was told for the first time that Delaney's condition had deteriorated significantly and that his death was eminent.**

29. Admits that she began a vigil at Daniel B. Delaney's bedside shortly before his death but denies all other allegations contained in paragraph twenty-nine. **(SAME)**

30. Denies for lack of information or knowledge sufficient to reach a conclusion as to the truth thereof the allegations contained in paragraph thirty. **(SAME)**

31. Denies the allegations contained in paragraph thirty-one. **(SAME)**

32. Denies the allegations contained in paragraph thirty-two except to the extent borne out by the referenced documents which are the best evidence of their contents. **(SAME)**

33. Admits the allegations contained in paragraph thirty-three. **(SAME)**

34. Denies the allegations contained in paragraph thirty-four. **(SAME)**

35. Denies the allegations contained in paragraph thirty-five. **(SAME)**

36. Denies the allegations contained in paragraph thirty-six. **(SAME)**

37. Denies the allegations contained in paragraph thirty-seven. **(SAME)**

38. Denies the allegations contained in paragraph thirty-eight. **(SAME)**

39. Denies the allegations contained in paragraph thirty-nine except to the extent borne out by the referenced document which is the best evidence of its contents. **(SAME)**

40. Denies the allegations contained in paragraph forty except to the extent borne out by the referenced document which is the best evidence of its contents. **(SAME)**

41. Denies for lack of information or knowledge sufficient to reach a conclusion as to the truth thereof the allegations contained in paragraph forty-one. Answering further, defendant alleges that the so-called "First Will" is a forgery and a fraud. **(SAME)**

42. Denies the allegations contained in paragraph forty-two. **(SAME)**

43. Denies the allegations contained in paragraph forty-three. **(SAME)**

44. Admits the allegations contained in paragraph forty-four. Answering further, defendant asserts that she did have knowledge of the so-called "Second Will." Answering further, defendant alleges that the so-called "Second Will" is a forgery and a fraud. **And in further answer defendant asserts that she never received notification as is required under the law for a surviving spouse and that therefore the time limit requirement for challenging a Will is inapplicable. And in further answer she states that under D.C. Code § 20-331, where fraud is present, or forgeries have occurred (as here) time limits are inapplicable. And in further answer defendant Valentine states that on information and belief the Plaintiff Lawrence Elliott is the perpetrator, or a participant in the preparation of a fraudulent Will that is currently being investigated by the**

Fraud and Bunko Section of the Metropolitan Police Department and that probative evidence exists of the fact that the signature of the decedent on the Will admitted to probate are forgeries and on information and belief the entire Will preparation process including the witnesses thereto are part of a fraudulent scheme perpetrated by Lawrence Elliott and/or unknown others.

45. The allegations contained in paragraph forty-five are conclusions of law requiring no response but, to the extent deemed allegations of material fact, they are denied. **(SAME)**

46. Denies for lack of information or knowledge sufficient to reach a conclusion as to the truth thereof the allegations contained in paragraph forty-six. **(SAME)**

47. The allegations contained in paragraph forty-seven are conclusions of law requiring no response but, to the extent deemed allegations of material fact, they are denied. **And in further answer the Virginia State University Credit Union account was a joint account opened by Edna Valentine and Daniel Delaney together for the primary purpose of having a separate account for Edna J. Valentine owned and controlled by her. That account has always been considered by the couple as primarily the property of Edna J. Valentine and not Daniel Delaney. Because of the relationship of the parties as common law husband and wife that particular account was essentially by its very nature a "convenience account" allowing access of Daniel Delaney to Valentine's funds at times when he was living with her in Petersburg, Virginia. The lack of activity in that account attributable to Delaney over the years over the many years this account was open, supports this legal conclusion.**

48. The allegations contained in paragraph forty-eight are conclusions of law requiring no response but, to the extent deemed allegations of material fact, they are denied.

(SAME)

49. Denies the allegations contained in paragraph forty-nine. **(SAME)**

50. The allegations contained in paragraph fifty are conclusions of law requiring no response but, to the extent deemed allegations of material fact, they are denied. **(SAME)**

51. The allegations contained in paragraph fifty-one are conclusions of law requiring no response but, to the extent deemed allegations of material fact, they are denied. **(SAME)**

52. The allegations contained in paragraph fifty-two are conclusions of law requiring no response but, to the extent deemed allegations of material fact, they are denied. **And in further answer to the extent the common law marriage relationship avoids tax liability for federal estate taxes or D.C. inheritance taxes, by reason of the non-taxable transfer rules, for transfer to a surviving spouse. The statement that taxes are due, is therefore, an erroneous conclusion of fact and law.**

53. The allegations contained in paragraph fifty-three are conclusions of law requiring no response but, to the extent deemed allegations of material fact, they are denied. **(SAME)**

54. The allegations contained in paragraph fifty-four are argument of the pleader requiring no answer, but to the extent deemed allegations of material fact, they are denied. **(SAME)**

55. Defendant incorporates and realleges paragraphs one through fifty-four of this her answer **and amended answer** as if fully stated herein.

56. The allegations contained in paragraph fifty-six are argument of the pleader requiring no answer, but to the extent deemed allegations of material fact, they are

denied. **(SAME)**

57. The allegations contained in paragraph fifty-seven are argument of the pleader or conclusions of law requiring no answer, but to the extent deemed allegations of material fact, they are denied. **(SAME)**

58. The allegations contained in paragraph fifty-eight are argument of the pleader requiring no answer, but to the extent deemed allegations of material fact, they are denied. **(SAME)**

59. The allegations contained in paragraph fifty-nine are argument of the pleader or conclusions of law requiring no answer, but to the extent deemed allegations of material fact, they are denied. **(SAME)**

60. The allegations contained in paragraph sixty are conclusions of law requiring no response but, to the extent deemed allegations of material fact, they are denied. **(SAME)**

WHEREFORE, having fully answered, defendant respectfully prays that plaintiff's demands for relief be denied, his complaint dismissed, and defendant be awarded her attorney's fees, expenses and costs of this litigation and such other and further relief as this Court deems just.

61. Defendant incorporates and realleges paragraphs one through sixty of this her answer **and amended answer** as if fully stated herein.

62. Admits the allegations contained in paragraph sixty-two **as the common law wife of the decedent.**

63. Denies the allegations contained in paragraph sixty-three. **(SAME)**

64. Denies the allegations contained in paragraph sixty-four. **(SAME)**

65. Denies the allegations contained in paragraph sixty-five. **And in further answer Valentine states that the Decedent made all of the decisions to transfer the account**

to her, he made the contact with his financial advisor at Merrill Lynch, and arranged all of the documents that accomplished the transfer to her. She did nothing except do what he asked to effectuate the transfer.

66. The allegations contained in paragraph sixty-six are argument of the pleader requiring no answer, but to the extent deemed allegations of material fact, they are denied. **And in further answer, the evidence in the form of the deposition of the Merrill Lynch representative is to the contrary. In fact the Decedent decided on his own and without any persuasion at all to make the transfers that he in fact made prior to his death.**

67. Denies the allegations contained in paragraph sixty-seven. **(SAME)**

68. Denies the allegations contained in paragraph sixty-eight. **(SAME)**

69. Denies the allegations contained in paragraph sixty-nine. **(SAME)**

70. Denies the allegations contained in paragraph seventy. **(SAME)**

71. Denies the allegations contained in paragraph seventy-one. **(SAME)**

WHEREFORE, having fully answered, defendant respectfully prays that plaintiff's demands for relief be denied, his complaint dismissed, and defendant be awarded her attorney's fees, expenses and costs of this litigation and such other and further relief as this Court deems just.

72. Defendant incorporates and realleges paragraphs one through seventy-one of this her answer **and amended answer** as if fully stated herein.

73. Denies the allegations contained in paragraph seventy-three. **(SAME)**

74. Denies the allegations contained in paragraph seventy-four. **(SAME)**

75. Denies the allegations contained in paragraph seventy-five. **(SAME)**

76. The allegations contained in paragraph seventy-six are argument of the pleader requiring no answer, but to the extent deemed allegations of material fact, they are denied. **(SAME)**

77. Denies the allegations contained in paragraph seventy-seven. **(SAME)**

78. The allegations contained in paragraph seventy-eight are argument of the pleader requiring no answer, but to the extent deemed allegations of material fact, they are denied. **(SAME)**

WHEREFORE, having fully answered, defendant respectfully prays that plaintiff's demands for relief be denied, his complaint dismissed, and defendant be awarded her attorney's fees, expenses and costs of this litigation and such other and further relief as this Court deems just.

79. Defendant incorporates and realleges paragraphs one through seventy-eight of this her answer **and amended answer** as if fully stated herein.

80. Denies the allegations contained in paragraph eighty. **(SAME)**

81. The allegations contained in paragraph eighty-one are argument of the pleader requiring no answer, but to the extent deemed allegations of material fact, they are denied. **(SAME)**

WHEREFORE, having fully answered, defendant respectfully prays that plaintiff's demands for relief be denied, his complaint dismissed, and defendant be awarded her attorney's fees, expenses and costs of this litigation and such other and further relief as this Court deems just.

82. The allegations contained in paragraph eighty-two are conclusions of law requiring no response but, to the extent deemed allegations of material fact, they are denied.

(SAME)

83. Denies the allegations contained in paragraph eighty-three. **(SAME)**

84. Denies the allegations contained in paragraph eighty-four. **(SAME)**

WHEREFORE, having fully answered, defendant respectfully prays that plaintiff's demands for relief be denied, his complaint dismissed, and defendant be awarded her attorney's fees, expenses and costs of his litigation and such other and further relief as this Court deems just.

85. Defendant incorporates and realleges paragraphs one through eighty-four of this her answer **and amended answer** as if fully stated herein.

86. The allegations contained in paragraph eighty-six are argument of the pleader requiring no answer, but to the extent deemed allegations of material fact, they are denied. **And in further answer that the statements in the Complaint paragraph 86 are further evidence of fraud in the preparation of the Last Will and Testament in that the fraudulent preparer thereof apparently had no knowledge that the Virginia State University Credit Union account was at all times used as a personal bank account of the defendant Edna Valentine. It is inconceivable that a comprehensive "estate plan" for an estate of a size over one million dollars could have been prepared by the decedent for his signature in one day on or about July 31, 1993. Moreover, no person present at the purported "will signing" was qualified to prepare such a plan. This is even more evidence of the preparation of the purported Will after the decedent's death.**

87. The allegations contained in paragraph eighty-seven are argument of the pleader requiring no answer, but to the extent deemed allegations of material fact, they are denied. **(SAME)**

88. Denies the allegations contained in paragraph eighty-eight. **(SAME)**

89. The allegations contained in paragraph eighty-nine are argument of the pleader requiring no answer, but to the extent deemed allegations of material fact, they are denied. **(SAME)**

90. The allegations contained in paragraph ninety are argument of the pleader requiring no answer, but to the extent deemed allegations of material fact, they are denied. **(SAME)**

91. The allegations contained in paragraph ninety-one are argument of the pleader requiring no answer, but to the extent deemed allegations of material fact, they are denied. **(SAME)**

92. Any allegation of the Complaint not specifically admitted is hereby denied. **And in further answer defendant does state on information and belief and based upon new evidence recently acquired that both versions of the Wills submitted to probate by Lawrence Elliott and or unknown persons are documents fraudulently prepared without the intent of the decedent to make a Will. That the signatures thereon as to the decedent are forgeries. That the signatures of witnesses are not in good form, were not made in the presence of the decedent and were from persons, on information and belief, acting with Lawrence Elliott in a fraudulent manner to deprive the rightful heir at law Edna J. Valentine of the proceeds of the estate of her common law husband Daniel B. Delaney.**

WHEREFORE, having fully answered, defendant respectfully prays that plaintiff's demands for relief be denied, his complaint dismissed, and defendant be awarded her attorney's fees, expenses and costs of his litigation and such other and further relief as this Court deems just.

93. The common law wife of Daniel B. Delaney,

hereby demands a jury trial on issues of fact, and demands strict proof before the jury of each and every element of each of the purported "Wills", including but not limited to the evidence of the intent of the decedent to make a Will, evidence of his capacity to make a Will, the validity of his signatures as they purportedly appear on the documents, the purported presence of the purported witnesses to the Will signing process and the identity of the purported witnesses as disinterested persons. On information and belief some or all of the purported witnesses are related to or close associates of the personal representative named in the forged and fraudulent Wills.

94. Valentine demands strict proof that he personal representative is, as he alleges, a "cousin" of the decedent, and states upon information and belief that he is no relation at all to the decedent.

95. The investigation by a detective of the Metropolitan Police Department of the circumstances of the forgeries herein described and of the fraud upon the defendant herein in this court in submitting false will(s) is ongoing. To the extent facts and details of the fraud perpetrated continue to be discovered, Defendant Valentine requests ongoing leave to amend in conformance with the rules of pleading and evidence in the District of Columbia allowing liberal amendment of allegations in pleading.

WHEREFORE, having fully answered, defendant respectfully prays that plaintiff's demands for relief be denied, his complaint dismissed, and defendant be awarded her attorney's fees, expenses and costs of this litigation and such other and further relief as this Court deems just.

GROUNDS OF DEFENSE

Defendant will rely upon the defenses of laches, statutes of limitations, the doctrine of unclean hands, duress, fraud and any other defense as will appear during the pendency of this cause.

AFFIDAVIT AND VERIFICATION

After first being duly sworn, Affiant does hereby state as follows:

1. I declare and affirm that the content of the foregoing Amended Answer is true and correct to the best of my knowledge and belief under the penalties of perjury.

2. I further state that the reason that I learned very recently, within the last 30 days, of the fact that the purported signature of Daniel B. Delaney on the forged will(s) was not the signature of Mr. Delaney, but rather a "tracing".

3. I further state that I was never notified naming my status as
the common law wife and sole heir at law of Daniel B. Delaney of the admission to probate of the purported will of July 31, 1993.

4. I further state that I was myself unaware of the provisions of the District of Columbia law to the effect that I am the common law wife of Daniel B. Delaney, because we in fact co-habitated in the District of Columbia as man and wife on numerous occasions on a generally continual basis and held ourselves out as such for over 30 years, and introduced ourselves as such upon innumerable occasions during the 30 year time period of our relationship. However, I did not learn of the provisions of the District of Columbia law authorizing and legalizing such unions until within the last 30 days.

5. I further state that I have examined the Motions and document "Exhibits" filed with the foregoing Amended Answer, and accompanying motions, and each and every document used as a reference therein, except the two purported "Wills", dated July 18th, and July 31, 1993, which I believe to be forgeries, are genuine to the best of my present knowledge information and belief.

Further, affiant sayeth not.

Edna J. Valentine

Edna J. Valentine

Commonwealth of Virginia)
)to-wit:

City/County of Petersburg

Appeared before me, the undersigned Notary Public for the aforesaid jurisdiction, Edna J. Valentine, and after making herself known to me and after having been placed under oath did swear that the foregoing statement was true and correct to the best of her knowledge and belief.

My Commission Expires: 10-31-98

William N. Bland
Notary Public

Respectfully submitted,

[s]

Raymond B. Benzinger, Esquire
D.C. Bar No. 141143
Counsel for defendant
2009 N. 14th Street
Suite 410
Arlington, Virginia 22201
(703) 525-1362

[s]

Walter T. Charlton
D.C. Bar # 186940
Co-Counsel for the Defendant
230 Kirkley Road
Annapolis, Maryland 21401
Internet charltonwt@aol.com
Phone 410-571-8764

CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was mailed, postage prepaid to

Jason P. Green, Esquire, Counsel for Plaintiff,
4301 Verplanck Place, N.W.,
Washington, D.C. 20016,

this 17th day of March, 1997.

[s]

Walter T. Charlton

HARTFORD R. KITTEL, J.D.

Examiner Of Questioned Documents
4315 Adrienne Drive
Retired FBI Agent Alexandria, Virginia
Board Certified (703) 360-6203 ● (703) 360-7827

February 24, 1997

DOCUMENT EXAMINATION REPORT

Raymond B. Benzinger, Esq. Benzinger & Benzinger, P.C.
2009 North 14th Street, Suite 612 Arlington, Virginia 22201
REFERENCE: Examination of Questioned
Documents Elliot v. Valentine

The evidence was submitted by Mr. Benzinger via First Class Mail on May 10, 1996.

Qcl Photocopy of five-page Will dated 18th July 1993. Qc2 Photocopy of four-page Will dated 31st July 1993. Qc3 Photocopy of Power of Attorney dated July 19, 1993.

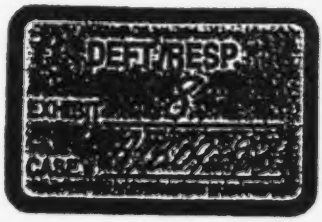
Kcl The following photocopies bear the known handwriting of Daniel B. Delaney: Application for Credit Union Membership dated 11/9/86; signature card for Federal Credit Union dated September 23, 1986; and signature card dated 9/23/86.

Kc2 Photocopy of Asset Transfer Authorization dated July 27, 1993 bearing the handwriting of Daniel B. Delaney.

Evidence examined in Washington, DC Probate Court Clerk's office on May 21, 1996.

Ql Original five-page Will dated 18th July 1993.

Q2 Original four-page Will dated 31st July 1993.



Evidence received from Mr. Benzinger via First Class Mail on June 13, 19 96.

Kc3 Two Power Of Attorney forms bearing the signatures of Daniel B. Delaney, undated.

Evidence submitted at Mr. Walter Charlton at the office of Benzinger & Benzinger, 2009 North 14th Street, Suite 612, Arlington, Virginia on February 24, 1997.

K4 Original signature pages of two Last Will and Testament documents of Daniel B. Delaney, both dated 31 March 1983.

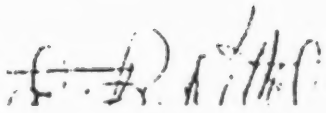
RESULTS:

Based upon the examination possible of the photocopies, Qc3, Kcl, Kc2, Kc3, and original signatures on K4, in conjunction with the examination of the original signatures on Ql and Q2, the following conclusions were reached:

The handwritten signatures of Daniel B. Delaney, as they appear on Kc2 and Kc3, diverge significantly from the hand written signatures represented by Kcl and K4 and were outside the normal handwriting of Daniel B. Delaney as established by Kcl and K4.

The conclusion was reached that Daniel B. Delaney, the writer of Kcl, Kc2, Kc3 and K4, did not prepare the two Daniel Boone Delaney signatures on Ql, the Daniel B. Delaney signature on Q2, or the Daniel B. Delaney signature on Qc3 in his normal handwriting as established by Kcl and K4 or his signatures as established by Kc2 and Kc3.

The two Daniel Boone Delaney signatures on Ql, the Daniel B. Delaney signature on Q2, and the Daniel B. Delaney signature on Qc3 are very probably simulations or tracings of the true signature of Daniel B. Delaney as established by Kcl and K4.



Hartfford R. Kittel
Forerisic Document Examiner

The submitted evidence (K4) was retained by Mr. Charlton.